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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA.

FROM MARCH 6, 1906, TO DECEMBER 22, 1906.

OFFICIAL REPORT.

VOLUME 34.

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The opinions in this volume of the Montana Reports have been edited and are reported, under the supervision of the Justices, by Mr. A. C. Schneider, a member of the bar of the supreme court.

(iii)

JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, }
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

OFFICERS OF THE COURT ON JANUARY 1, 1907.

ALBERT J. GALEN, Attorney General.

W. H. POORMAN, First Asst. Attorney General.

EDGAR M. HALL, Second Asst. Attorney General.

JOHN T. ATHEY, Clerk.

MARSHALL N. RACE, Marshal.

AUGUST C. SCHNEIDER, Court Stenographer.

ATTORNEYS AND COUNSELORS AT LAW

Admitted from January 10, 1907, to March 21, 1907.

BAILEY, J. E. M., Admitted February 5, 1907.

BENNET, HOWARD G., Admitted February 5, 1907.

FOOT, LE ROY A., Admitted February 26, 1907.

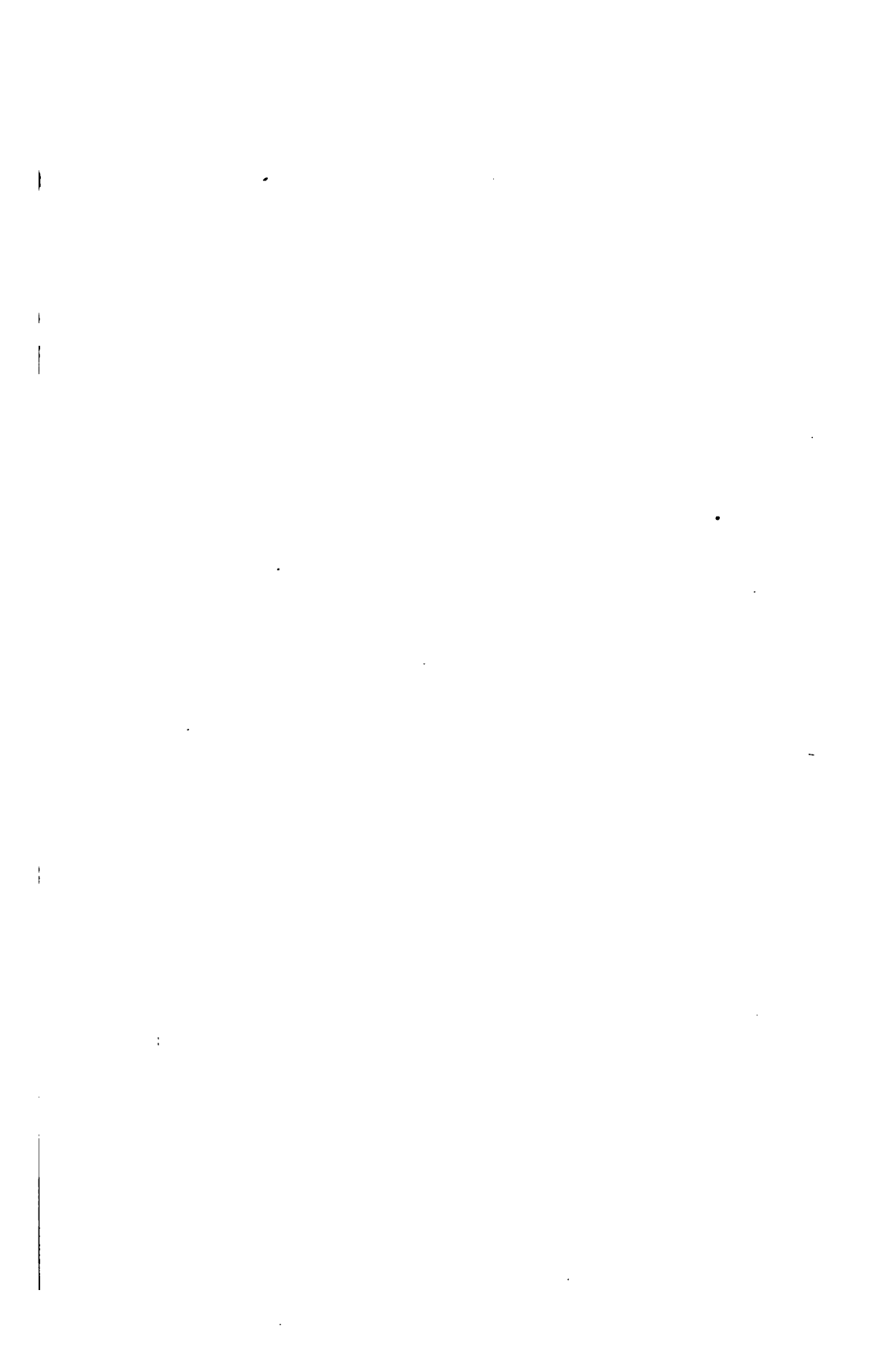
HILBERT, PEARL KENNEDY, Admitted June 16, 1906.

KIRK, WILLIAM R., Admitted March 5, 1907.

LAMB, M. J., Admitted February 25, 1907.

REIMESTAD, GEORGE I., Admitted March 16, 1907.

(v)



DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA.
1907.

FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.

District Judges: Hon. James M. Clements; *Hon. Thomas C. Bach.

Officers: County Attorney, A. P. Heywood, Esq.; Clerk of District Court, Sidney Miller; Sheriff, James A. Shoemaker.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.

District Judges: Hon. George M. Bourquin; Hon. Michael Donlan; Hon. J. J. Lynch.

Officers: County Attorney, J. E. Murray, Esq.; Clerk of District Court, W. E. Davies; Sheriff, C. S. Henderson.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.

District Judge: Hon. George B. Winston.

Officers of Deer Lodge County (County Seat, Anaconda)—
County Attorney, John W. James, Esq.; Clerk of District Court, Ira C. Gnose; Sheriff, T. J. Fleming.

Officers of Powell County (County Seat, Deer Lodge)—
County Attorney, S. P. Wilson, Esq.; Clerk of District Court, R. Lee Kelly; Sheriff, H. Fifer.

Officers of Granite County (County Seat, Philipsburg)—
County Attorney, D. M. Durfee, Esq.; Clerk of District Court, George O. Burke; Sheriff, John D. Kennedy.

*Appointed March 7, 1907, to fill the unexpired term of Hon. Henry C. Smith, elected Associate Justice of the Supreme Court.

FOURTH JUDICIAL DISTRICT.

Counties of Missoula, Ravalli and Sanders.

District Judges, Hon. F. C. Webster; *Hon. Henry L. Myers.

Officers of Missoula County (County Seat, Missoula)—
County Attorney, T. N. Marlowe, Esq.; Clerk of District Court,
R. W. Kemp; Sheriff, H. B. Campbell.

Officers of Ravalli County (County Seat, Hamilton)—County
Attorney, W. P. Baker, Esq.; Clerk of District Court, A. C.
Baker; Sheriff, Wm. Ward.

Officers of Sanders County (County Seat, Thompson Falls)—
County Attorney, H. C. Schultz; Clerk of District Court, C. E.
Livesay; Sheriff, J. H. Massey.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judge, Hon. Llewellyn L. Callaway.

Officers of Beaverhead County (County Seat, Dillon)—
County Attorney, Henry R. Melton, Esq.; Clerk of District
Court, F. A. Hazelbaker; Sheriff, M. L. Gist.

Officers of Jefferson County (County Seat, Boulder)—
County Attorney, D. M. Kelley, Esq.; Clerk of District Court,
George Pfaff; Sheriff, P. J. Manning.

Officers of Madison County (County Seat, Virginia City)—
County Attorney, S. V. Stewart, Esq.; Clerk of District Court,
J. G. Walker; Sheriff, Charles Kadell.

SIXTH JUDICIAL DISTRICT.†

Counties of Park and Sweet Grass.

District Judge, Hon. Frank Henry.

Officers of Park County (County Seat, Livingston)—County
Attorney, O. M. Harvey, Esq.; Clerk of District Court, Arthur
Davis; Sheriff, H. McCue.

*Appointed March 7, 1907, in pursuance of Act of Tenth Legislative Assembly, approved March 7, 1907, making provision for one additional judge for the Fourth Judicial District and making it incumbent upon one of the judges to maintain chambers at Hamilton, Ravalli county.

†District changed by Act of the Tenth Legislative Assembly, approved February 1, 1907.

Officers of Sweet Grass County (County Seat, Big Timber)—County Attorney, J. E. Barbour, Esq.; Clerk of District Court, H. C. Pound; Sheriff, O. A. Fallang.

SEVENTH JUDICIAL DISTRICT.*

Counties of Custer and Dawson.

District Judge, Hon. Chas. H. Loud.

Officers of Custer County (County Seat, Miles City)—County Attorney, S. Walker, Esq.; Clerk of District Court, A. T. McAusland; Sheriff, W. E. Savage.

Officers of Dawson County (County Seat, Glendive)—County Attorney, Theo. Lentz, Esq.; Clerk of District Court, Harry Sample; Sheriff, A. Larson.

EIGHTH JUDICIAL DISTRICT.

County of Cascade. County Seat, Great Falls.

District Judge, Hon. Jere B. Leslie.

Officers: County Attorney, J. W. Speer, Esq.; Clerk of District Court, Chas. C. Procter; Sheriff, Edward Hogan.

NINTH JUDICIAL DISTRICT.

Counties of Gallatin and Broadwater.

District Judge, Hon. W. R. C. Stewart.

Officers of Gallatin County (County Seat, Bozeman)—County Attorney, Ben. B. Law, Esq.; Clerk of District Court, C. B. Anderson; Sheriff, E. M. Reynolds.

Officers of Broadwater County (County Seat, Townsend)—County Attorney, J. A. Matthews, Esq.; Clerk of District Court, F. Bubser; Sheriff, W. T. Deadmond.

*District changed by Act of Tenth Legislative Assembly, approved February 1, 1907.

TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.

District Judge, Hon. E. K. Cheadle.

Officers of Fergus County (County Seat, Lewistown)—
County Attorney, R. E. Ayers, Esq.; Clerk of District Court,
J. B. Ritch; Sheriff, Edw. Martin.

Officers of Meagher County (County Seat, White Sulphur
Springs)—County Attorney, W. L. Ford, Esq.; Clerk of Dis-
trict Court, A. C. Grande; Sheriff, Geo. L. Williams.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Teton.

District Judge, Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—
County Attorney, W. T. McKeown, Esq.; Clerk of District
Court, J. K. Lang; Sheriff, W. H. O'Connell.

Officers of Teton County (County Seat, Chouteau)—County
Attorney, P. I. Cole, Esq.; Clerk of District Court, S. Mc-
Donald; Sheriff, K. McKenzie.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge, Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton)—
County Attorney, F. A. Carnal, Esq.; Clerk of District Court,
C. H. Boyle; Sheriff, Frank McDonald.

Officers of Valley County (County Seat, Glasgow)—County
Attorney, J. L. Slattery, Esq.; Clerk of District Court, C. C.
Beede; Sheriff, S. C. Small.

THIRTEENTH JUDICIAL DISTRICT.*

Counties of Carbon, Rosebud and Yellowstone.

District Judge, †Hon. Sydney Fox.

Officers of Carbon County (County Seat, Red Lodge)—

*Created by Act of Tenth Legislative Assembly, approved February
1, 1907.

†Appointed March 5, 1907.

County Attorney, *Frank P. Whicher, Esq.; Clerk of District Court, H. A. Simmons; Sheriff, F. S. Bachelder.

Officers of Rosebud County (County Seat, Forsyth)—County Attorney, Geo. A. Horkan, Esq.; Clerk of District Court, D. J. Muri; Sheriff, R. J. Guy.

Officers of Yellowstone County (County Seat, Billings)—County Attorney, H. L. Wilson, Esq.; Clerk of District Court, F. H. Foster; Sheriff, J. T. Webb.

*Appointed to fill unexpired term of Hon. Sydney Fox, appointed District Judge.

ERRATUM.

On page 412, line 3 from bottom of page, omit word “not,” and read the sentence as follows: “Among other instructions as to the credibility of witnesses, complained of by the defendants,” etc.

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SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, promulgated February 1, 1905, see Vol. XXX, Montana Reports, page xxix, and for Amendment of Rule IX, promulgated December 22, 1906, see Vol. XXXIII, page xxi.

(xxvii)

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
MARCH TERM, 1906.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

PALMER, RESPONDENT, *v.* SPAULDING, APPELLANT.

(No. 2,235.)

(Submitted March 3, 1906. Decided March 6, 1906.)

Appeals—Justices' Courts—Appealable Orders.

1. An order of the district court dismissing an appeal from a justice's court is not a final judgment from which an appeal lies, nor is it an appealable order under Code of Civil Procedure, section 1722, as amended by Laws of 1899, page 146.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

ACTION by Claude A. Palmer against A. A. Spaulding. From an order dismissing an appeal from a judgment of a justice's court, defendant appeals. Dismissed.

Mr. J. L. Staats, for Appellant.

Mr. H. A. Bolinger, for Respondent.

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MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action, brought for the purpose of recovering the possession of certain personal property, originated in a justice's court of Gallatin county. From a judgment in plaintiff's favor, defendant appealed to the district court. Plaintiff moved that court to dismiss the appeal on grounds the merits of which need not be noticed. The court sustained the motion, causing to be entered in the minutes the following order: "Motion to dismiss, heretofore taken under advisement, is at this time sustained by the court." From this order the defendant thereupon attempted to appeal to this court as from a final judgment.

In this court the plaintiff has interposed an objection to the consideration of the appeal on the merits, on the ground that this court has no jurisdiction. It is clear that the order is neither in form nor substance a final judgment; and, not being in itself an appealable order (Code Civ. Proc., sec. 1722, amended by Act of 1899 [Session Laws 1899, p. 146], this court has no jurisdiction to consider the case upon the merits, and plaintiff's objection must be sustained.

The appeal is therefore dismissed.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

HELBERT, APPELLANT, v. TATEM, RESPONDENT.

(No. 2,226.)

(Submitted February 26, 1906. Decided March 6, 1906.)

Mines—Adverse Claims—Pleadings—Complaint—Presumptions.***Mines—Adverse Claims—Complaint—Sufficiency.***

1. In the absence of a special demurrer for ambiguity or uncertainty, a complaint in an action to determine an adverse claim to mining property, alleging that on July 9, 1903, defendant made application for a patent for a conflicting location, and that on the eighth day of September, following, before the sixty days' notice of defendant's application for a patent had expired, plaintiff filed his adverse claim and protest under oath, but failing to state when the first publication of the notice of application for patent was made, was sufficient and not vulnerable to attack by general demurrer.

Mines—Adverse Suits—Presumptions.

2. The presumption will not be indulged, in an adverse suit, that the first publication of the notice of application for patent to a mining claim (U. S. Rev. Stats., sec. 2325) was made upon the same date on which the application was filed.

Mines—Adverse Suits—Complaint.

3. The complaint in an adverse suit need not state when the first publication of the notice of application for patent, required by section 2325, United States Revised Statutes, was made, if it otherwise appears that the adverse claim was filed in time.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Charles Helbert against Benjamin H. Tatem. From a judgment in favor of defendant plaintiff appeals. Reversed.

Messrs. H. G. & S. H. McIntire, for Respondent.

Mr. Lincoln Working, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action to determine an adverse claim, commenced in the district court on October 6, 1903. The amended complaint alleges that the plaintiff is a citizen of the United States;

that he is the owner (except as against the paramount title of the United States), in possession and entitled to the possession of the Rocky Point quartz lode mining claim, situated in Lewis and Clark county, Montana, and that he located the claim in 1893. A description of the claim is given, and the several acts done in locating it are set forth at length. It is alleged that the defendant claims a part of the ground covered by the location of the Rocky Point claim, as the Dorset quartz lode mining claim, and the ground in dispute is particularly described and a plat showing such conflict is attached to the complaint. It is also alleged that on July 9, 1903, the defendant made application for patent for the Dorset claim. The amended complaint then proceeds: "Plaintiff further alleges that on the eighth day of September, A. D. 1903, and before the sixty days' notice of application for patent of said Dorset lode mining claim had expired, plaintiff duly filed in the United States land office at Helena, Montana, wherein said application for patent was and is pending, his adverse claim and protest under oath," etc., and on the same day the register and receiver made an order staying all further proceedings, etc. It is alleged that the claim of the defendant to the ground in controversy is without any right, and that such claim casts a cloud upon plaintiff's title to the Rocky Point claim, and interferes with and injures him in the use and enjoyment thereof. The prayer is that the defendant be required to set forth the nature of his claim to the ground in controversy, and that the relative rights of the parties thereto may be determined, and that the defendant may be enjoined from asserting any claim whatever to any portion of the Rocky Point claim. There are numerous other allegations in the complaint which are not necessary to be considered now. To this amended complaint a general demurrer was interposed and sustained, and the plaintiff electing to stand on his amended complaint, judgment was entered in favor of the defendant, from which judgment the plaintiff appeals.

It is contended by the respondent that the amended complaint shows upon its face that the adverse claim was not filed

in the local land office within the sixty-day period of publication of notice of application for patent for the Dorset claim, and therefore does not state a cause of action. It is to be observed that the amended complaint does not anywhere state when the first publication of notice of application for patent for the Dorset claim was made, and it is not necessary, if it otherwise appears that the adverse claim was filed in time. It does allege that the adverse claim was filed on the eighth day of September, 1903, and before the expiration of the sixty days' notice of application for patent. This allegation may be open to the objection that it is ambiguous and uncertain, but we think it may fairly be gathered therefrom that the adverse claim was filed before the expiration of the sixty-day period of publication of notice of application for patent for the Dorset claim. Counsel for respondent in their brief say: "The eighth day of September was sixty-one days after July 9th, the date of the first publication of the notice of patent application." This may be true as a matter of fact, but it does not appear from the amended complaint, and we cannot go outside the record in determining the sufficiency of this complaint. To say the least, there is not any presumption that the first publication occurs upon the same date that the application is filed. The sixty-day period, during which the notice of application for patent must be published, as required by section 2325 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 1429), commences to run *from* the date of the first publication (Regulations Interior Department, June 24, 1899), and that may or may not have been made on the day the application was filed. If, in any given instance, publication is made in a weekly paper, and it should so happen that application for patent is made the day following the publication of any particular issue of the paper, then the first publication of the notice would be six days later than the date of application for patent. And it might so happen, because of a press of business in the land office, that the first publication would be deferred even later than that; so that, in the absence of any allegation showing

when the first publication of the notice was made, it is impossible to say that this adverse claim was not filed in time, while, on the contrary, the allegation of the amended complaint quoted above is sufficient, in the absence of a special demurrer for ambiguity or uncertainty, to show that it was filed in time.

The questions, also suggested by this record: (1) Did the leaving of the adverse claim and proper fees with the officials of the local land office, on September 5, 1903, constitute the filing of such adverse claim within the meaning of section 2326 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 1430) ?, and (2), if the sixtieth day of the period of publication falls on a legal holiday, may the adverse claimant file his adverse claim on the next succeeding day ?, are not properly before us, as a decision of neither is necessary to a determination of the question actually involved here. This appeal only presents the single question: Does the amended complaint state a cause of action? We think it does, and that the district court erred in sustaining the general demurrer.

Let the judgment be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

STATE, RESPONDENT, v. KREMER, APPELLANT.

(No. 2,232.)

(Submitted March 1, 1906. Decided March 19, 1906.)

Criminal Law—Larceny—Appeal—Record—New Trial—Notice—Instructions.

Criminal Law—New Trial—Appeal—Bill of Exceptions.

1. Under section 2, Chapter XXXIV, p. 48, Session Laws of 1903, the only manner of reviewing an order granting or refusing a new trial in a criminal case is upon a bill of exceptions incorporating the matters upon which it is based.

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Same—Bill of Exceptions—Settlement—Notice—Statutes.

2. *Held*, that the provisions of section 2171 of the Penal Code, and of section 1 of Chapter XXXIV, page 47, Session Laws of 1903, relating to the settlement of bills of exceptions in criminal cases, and providing that the draft of a proposed bill must be presented, upon at least two days' notice to the adverse party, to the judge for settlement or delivered to the clerk for the judge, are mandatory; that the giving of such notice is an indispensable prerequisite to the consideration of the bill by the supreme court, and that the record must show affirmatively the fact of the giving of such notice.

Same—Bill of Exceptions—Delivery of Copy to Adverse Party—Notice.

3. Delivery of a copy of a proposed bill of exceptions to the county attorney, in a criminal case, does not meet the requirements of Penal Code, section 2171, and section 1, Chapter XXXIV, Laws of 1903, page 47, relative to notice of at least two days to the adverse party prior to delivery of such bill to the judge for settlement.

Same—Grand Larceny—Trial—Instructions—Appeal.

4. In a prosecution for larceny, an instruction that, if it was possible for the jury upon the evidence to account for the taking of the property mentioned, upon any reasonable hypothesis other than the guilt of defendant, they should do so, and find the defendant not guilty, cannot be said to be appropriate to every case, and, where the evidence is not before the supreme court on appeal, the refusal of the trial court to give such instruction will not be reviewed.

Appeal—Error—Presumptions—Record.

5. Error will not be presumed by an appellate court; it must be made to appear affirmatively in the record to entitle it to consideration.

Criminal Law—Instructions—Jury.

6. A requested instruction in a criminal prosecution that the jury should not consider their personal opinions as to the facts proven, and that they might believe as men that certain facts exist, but as jurors they could only act upon the evidence introduced upon the trial, and from that and that alone they should form their verdict, unaided, unassisted and uninfluenced by any opinion or presumption not framed upon the testimony, was properly refused.

Same—Larceny—Instructions—Reasonable Doubt.

7. The refusal of the trial court, in a prosecution for larceny, to give a requested instruction to the effect that the state must prove every material allegation of the information beyond a reasonable doubt, did not constitute error where the same subject had been covered by numerous instructions given by the court though in different language from that found in the offered instruction.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

NELLIE KREMER was convicted of the crime of grand larceny, and appeals from the judgment of conviction and from an order denying her a new trial. *Affirmed.*

Mr. J. Bruce Kremer, and Mr. Edwin S. Booth, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Nellie Kremer was convicted of the crime of grand larceny, and appeals from the judgment and from an order denying her a new trial. The record presented here consists of the record of the action or judgment-roll, a bill of exceptions, the order denying the motion for a new trial, and the notice of appeal. There are nine assignments of error, four of which are presented by the record of the action or judgment-roll, and five by the bill of exceptions.

We are met at the outset by an objection on the part of the attorney general that the bill of exceptions cannot be considered for any purpose, for the reason that it does not appear, affirmatively or otherwise, that the proposed bill was presented to the judge, or delivered to the clerk for the judge, for settlement upon notice of at least two days to the county attorney. That portion of the record to which reference is made is designated "Statement on Motion for a New Trial, and Bill of Exceptions."

There is not any such thing recognized by the law of this state as a statement on motion for a new trial in a criminal case. The motion may be presented to the trial court on affidavits or a bill of exceptions, or both. For purposes of review by this court, the Code did not formerly require the affidavits to be made a part of the record, or to be authenticated by a bill of exceptions; but, by section 2, Chapter XXXIV, of Session Laws of 1903 (Laws of 1903, p. 48), they must be made a part of the record by bill of exceptions. Likewise, by sections 2172 and 2173 of the Penal Code, certain matters were deemed excepted to, and by section 2176 of the Penal Code,

these could be reviewed without a bill of exceptions; but by section 2, Chapter XXXIV, page 48, of the Acts of 1903 above, these sections were also amended to the extent that every matter enumerated in either section 2172 or 2173, above, must now be incorporated in a bill of exceptions, except the order granting or refusing a new trial, which is incorporated in the record by certificate of the clerk, as is the notice of appeal. So that, taking these provisions together, it is perfectly clear that the only manner of reviewing an order granting or refusing a new trial in a criminal case, is upon a bill of exceptions incorporating the matters upon which it is based.

Considering, then, that portion of the record here designated "Statement on Motion for a New Trial and Bill of Exceptions" as a bill of exceptions only, we are face to face with the attorney general's objection. Section 2171 of the Penal Code provides for the settlement of a bill of exceptions when presented by the defendant. Section 1 of Chapter XXXIV, Acts of 1903, above, provides for the settlement of a bill of exceptions when presented by either party, but the procedure is the same in either case. The draft of the proposed bill must be presented, upon at least two days' notice to the adverse party, to the judge for settlement or delivered to the clerk for the judge; if delivered to the clerk, the clerk must deliver it with proposed amendments, if any, to the judge. In *State v. Gawith*, 19 Mont. 48, 47 Pac. 207, decided in 1896, it was held that the giving of the two days' notice to the county attorney, as provided in section 2171, above, is an indispensable prerequisite to the consideration of a bill of exceptions by the appellate court, and that it must appear affirmatively from the record that such notice was given. This was followed and approved in *State v. Moffatt*, 20 Mont. 371, 51 Pac. 823, and in *State v. Stickney*, 29 Mont. 523, 75 Pac. 201. Section 1 of Chapter XXXIV, Acts of 1903, must be given the same meaning. We now repeat what was decided in those cases: That the provisions of section 2171 of the Penal Code, and of section 1 of Chapter XXXIV, of the Acts of 1903, above, relating to the settlement of bills of exceptions in criminal cases,

are mandatory, and that the record must show affirmatively that such notice was given; otherwise, the bill of exceptions will not be considered by this court.

But it may be said that a copy of the draft of the proposed bill of exceptions was, in this instance, given to the county attorney; but that does not meet the requirements of the statute. The reason for the rule announced in the cases above is apparent. After the county attorney receives notice that the proposed bill will be presented for settlement, he has from that time until the settlement of the bill, or until the proposed bill is delivered to the clerk, within which to propose amendments; and if he has not this notice, he has no knowledge of the time within which he must propose his amendments. In any event, the law in unmistakable language requires the notice to be given. It is not an unreasonable requirement and will be rigidly enforced. The presumption, at least, is that laws are enacted with that purpose in view. The record does not show that the notice which is required to be given by section 2171, or section 1, Chapter XXXIV, Laws of 1903, was given; nor does it even appear that the county attorney was present when the bill of exceptions was settled or that he knew anything about its settlement. Upon the authority of the cases cited above, we decline to consider the bill of exceptions in this case for any purpose whatever. It is also to be observed that by the provisions of section 2, of Chapter XXXIV, Acts of 1903, above, a demurrer to an information must be presented by bill of exceptions in order to have the action of the court thereon reviewed.

The questions presented upon the appeal from the judgment and which properly appear from the record of the case or judgment-roll, relate to the refusal of the trial court to give instructions numbered 21, 23, 25, and 26, requested by the defendant. The first half of No. 23 was given in a number of other instructions. No. 21 and the last half of No. 23 are to the same effect—that if it is possible for the jury, upon the evidence in the case, to account for the taking of the property

mentioned in the information upon any reasonable hypothesis other than the guilt of the defendant, then they should do so and find the defendant not guilty. It cannot be said that an instruction to this effect should be given in every case. As the evidence is not properly before us, we cannot examine it to determine whether in this particular case any error was committed by the trial court in refusing to give either or both of these offered instructions. Error will not be presumed; it must be made to appear affirmatively.

Instruction No. 25 is erroneous, and was properly refused. It is as follows: "You are instructed that your personal opinion as to the facts proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors, you can only act upon evidence introduced upon the trial, and from that, and that alone, you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption, not framed upon the testimony." If the juror is not to consider his personal opinion as to the facts proven, it would be interesting to know whose opinion he must consider. *Blashfield on Instructions to Juries*, sec. 360, *Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711, *Spies v. People*, 122 Ill. 18, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, and *Villereal v. State* (Tex. Cr. App.), 61 S. W. 715, are cited in support of appellant's contention that this instruction should have been given. But in the authorities cited an instruction such as No. 25 above was not considered. In every instance the instruction approved in effect told the jury not to consider any matter not in evidence in the case before them.

Instruction No. 26, refused, only attempts to emphasize the fact that the state must prove every material allegation of the information beyond a reasonable doubt. We think this feature of the case had been fairly covered by the numerous instructions upon that subject, given by the court. While the instructions given are not in the same language as No. 26 above, the jury must have understood from them their duty quite as fully as if this refused instruction had been given.

As it does not appear from this record that any error was committed, the judgment and order are affirmed

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

STATE, RESPONDENT, v. FULLER, APPELLANT.

(No. 2,230.)

(Submitted February 28, 1906. Decided March 19, 1906.)

Criminal Law—Evidence—Constitutional Guaranties—Instructions—Harmless Error.

Criminal Law—Murder—Cross-examination—Exclusion of Evidence—Harmless Error.

1. While the interest and feeling exhibited by a witness are material elements to be weighed by the jury in determining his credibility, yet, where in a prosecution for murder, a witness for the state had testified on cross-examination that he had not told the county attorney that he wanted to testify but that he "just went up there and told him"—thus making his interest in the case apparent to the jury—the exclusion of a further question whether he had sent anyone else to tell the county attorney of his desire to testify, though technically erroneous as an undue restriction of the cross-examination, was without prejudice.

Same—Evidence—Refusal to Strike Out—Error Cured.

2. Where the trial court, in a prosecution for murder, at first refused to strike out certain hearsay testimony, but subsequently ordered it stricken, and admonished the jury, both orally and in an instruction, not to consider it in making up their verdict, the prior erroneous ruling was fully cured and defendant cannot be heard to complain.

Same—Evidence—Waiver—Comparison of Shoes with Footprints—Admissibility—Constitutional Guaranties.

3. Where, on a trial for murder, defendant consented to the taking of his shoes for the purpose of comparison with footprints, leading from the place of the homicide, he waived the right to object to the use of such evidence against him on the ground that the Constitution, Article III, section 18, forbids its use when it declares that no person shall be compelled to testify against himself in a criminal proceeding.

Same.

4. *Obiter:* Evidence obtained by the taking of the shoes of defendant, charged with murder, against his consent, and comparing them with footprints leading from the place of the crime, is admissible, and its use does not deprive him of the constitutional guaranties prohibiting unreasonable searches and seizures (Const., Art. III, sec. 7), and declaring that no person shall be compelled to testify against himself in a criminal proceeding (sec. 18).

34	12
35	556
36	481

Same—Trial—District Courts—Commenting on Evidence.

5. Where, in a prosecution for murder, the trial court casually remarked, when a transcript of the evidence taken at the coroner's inquest was offered in defendant's behalf for impeachment purposes, that it was admitted for "what it was worth," such remark was not prejudicial to the defendant as a comment upon the weight of the evidence so offered.

Same—Instructions—Defining Malice.

6. A definition of "malice" in an instruction, not precisely conforming to Penal Code, section 7, but nevertheless sufficiently comprehensive to give the jury a definite idea of the meaning of the word, was not a cause for reversal, in the absence of a request for a more specific instruction.

Same—Instructions—"Heat of Passion"—Harmless Error.

7. Alleged error in an instruction in defining the expression "heat of passion" was harmless, where the jury found defendant guilty of murder in the first degree, and where the evidence did not tend to show a case of manslaughter.

Instructions—To be Taken Together.

8. In construing instructions to the jury the whole charge should be taken together.

Criminal Law—Instructions—Credibility of Witnesses—Harmless Error.

9. An instruction, in a prosecution for murder, which informed the jury that if they found that any witness had willfully and deliberately testified falsely as to any material fact in the case, they were at liberty to disregard his entire testimony, while in a subsequent sentence in the same paragraph the law was stated correctly: that such testimony could only be ignored in case no other corroborative evidence entitled to credit had been produced—though conflicting and erroneous, was not cause for reversal where it was not apparent that the jury were misled and where the verdict of guilty was obviously correct.

Same—Failure of Defendant to Testify—Instructions.

10. In a prosecution for murder, where the defendant had not been sworn as a witness, it was proper for the court, if it saw fit so to do, to instruct the jury that the defendant in a criminal proceeding cannot be compelled to be a witness against himself, and that if he does not testify this fact must not be used to his prejudice.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

MILES FULLER was convicted of murder of the first degree. From the judgment and from an order denying him a new trial he appeals. Affirmed.

Mr. John Lindsay, Mr. James M. Baldwin, and Mr. Edwin S. Booth, for Appellant.

A seizure which would tend to the production of evidence against appellant is an unreasonable seizure within the meaning of the Constitution. (*Boyd v. United States*, 116 U. S. 616,

6 Sup. Ct. 524, 29 L. Ed. 746 et seq.; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110 et seq.; *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819 et seq.; *United States v. Wong Quong Wong*, 94 Fed. 832.) A confession wrung from the appellant by force or putting in fear would have been excluded. Is it not reasonable to say that by analogy testimony secured by the use of articles of personal property taken by force from the possession of appellant should likewise be excluded and that its admission was error? To hold otherwise would be to say that officers may deprive a person of his property without due process of law and may aggravate the offense by using the same in an endeavor to deprive him of his life or liberty. This cannot be. (*State v. Rambo*, 69 Kan. 777, 77 Pac. 563, 564.)

In commenting upon the evidence the court invaded the province of the jury. The jury are the judges of the facts and of the effect or value of the evidence. (Pen. Code, 2105, 2078; Code Civ. Proc., 3390, 3123; *Gallick v. Bordeaux*, 31 Mont. 328, 78 Pac. 583, 584; *Yoder v. Reynolds*, 28 Mont. 183, 196, 72 Pac. 417; *State v. Hurst*, 23 Mont. 484, 492, 59 Pac. 911.) And in commenting upon the weight of the testimony the court committed error. (*Yoder v. Reynolds*, 28 Mont. 183, 196, 72 Pac. 417.) Remarks made by the judge during the progress of the trial, if immaterial and improper, may, when properly excepted to and brought into the record, constitute prejudicial and available error. (*Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797, 801 et seq.; *Wilson v. Territory*, 9 Okla. 331, 60 Pac. 112; *State v. Crofts*, 22 Wash. 245, 60 Pac. 403; *State v. Taylor*, 7 Idaho, 134, 61 Pac. 288; *State v. Lucas*, 24 Or. 168, 33 Pac. 538, 540; *Mathias v. State*, 45 Fla. 46, 34 South. 287; *State v. Allan*, 100 Iowa, 7, 69 N. W. 274, 275; *Bradshaw v. State*, 44 Tex. Cr. App. 222, 70 S. W. 215; *Wastl v. Montana Union Ry. Co.*, 17 Mont. 213, 217, 42 Pac. 772.)

The remark that the evidence was "Let in for what it was worth" has been held error, the reason being that the expression was liable to be taken by the jury as an intimation that in the opinion of the court the evidence was of little consequence.

(*Howland v. Oakland etc. Ry. Co.*, 115 Cal. 495, 47 Pac. 255, 257, 258.) And the error cannot be cured by instructions. (*State v. Taylor*, 7 Idaho, 134, 61 Pac. 289; *People v. Kindelberger*, 100 Cal. 367, 369, 34 Pac. 852.) The record in question was the official return of the coroner relating to the proceedings had and the testimony taken at the inquest held over the body of the decedent, and every presumption was in favor of its verity.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On November 7, 1904, defendant was by information charged with the crime of murder, and thereafter, having been tried upon his plea of not guilty thereto, was convicted of murder of the first degree and sentenced to death. He has appealed from the judgment and from an order denying him a new trial.

The brief of counsel assigns many rulings and decisions of the court, which, it is alleged, prejudiced the defendant in his substantial rights. Of these only a few are sufficiently meritorious to require special notice. The following brief statement of the facts will be sufficient to make clear the contentions made: It appears that the homicide grew out of a grudge of long standing between the defendant and Henry Gallahan, the deceased. The defendant had repeatedly stated that he intended to kill Gallahan at the first opportunity. He made this statement to the deceased himself in the presence of one of the witnesses, a few days prior to the killing. Both men occupied cabins a short distance west of the city of Butte. About 6 o'clock on the evening of October 24, 1904, two of the witnesses going east into the city, along one of its principal streets near its western outskirts, met the deceased going west, near where he was killed. One of these, two or three minutes after passing the deceased, saw the defendant standing be-

hind the corner of a school building "peeking" in the direction the deceased was going. A short time later the two, the defendant and the deceased, were observed further west standing a few yards apart on the hillside. No one was near enough to them to hear what, if anything, was said by either of them. The defendant first fired at the deceased. They then exchanged shots rapidly, both using revolvers, until the deceased fell mortally wounded by a shot in the head. The defendant then started west, but stopped, returned to where the deceased was lying, slashed his throat twice with a knife or other sharp instrument, severing the jugular vein, and then fled, escaping in the dusk of the evening. Those who witnessed the shooting were from two hundred and fifty to six hundred feet away; two of them, Semmons and Almquist, pursued the defendant for some distance. Though there was not sufficient light to enable him to distinguish the features of a man clearly, Almquist recognized him. Later on the same evening he was arrested. On the following day the undersheriff took the shoes worn by the defendant at the time of the arrest and compared them with footprints found leading from the place of the shooting to within a short distance of defendant's cabin. The impression made by the shoes corresponded exactly with these footprints. The evidence is that the undersheriff told the jailer to get defendant's shoes and that he went and took them off defendant in the corridor of the jail where he then was.

Gladstone Bray had witnessed the affray, but, though his name had been given to the coroner, he had not been called to testify at the inquest, nor had the county attorney been informed of the fact that he was an eyewitness until, on the evening before the trial began, he gave the information himself. When the trial opened, this fact having been made to appear, his name was by permission of the court indorsed upon the information. He was thereupon called and sworn as a witness. In one place in his testimony he positively identified the defendant as the man who was seen running from the scene of the shooting. On cross-examination, being questioned how he came to be called as a witness, he stated: "I did not

go to the county attorney and tell him I wanted to testify in the case. I just went up there and told him." He was then asked: "Did you send anyone else to him to tell him that you wanted to testify?" The county attorney having interposed a general objection, the witness was not permitted to answer. This ruling is assigned as error, because, it is said, the answer would "perhaps" have shown the interest of the witness in the outcome of the case, and hence should have gone to the jury as reflecting upon his credibility.

The interest and feeling of a witness are always material elements to be weighed and considered by the jury in determining the credibility of his story. It does not appear, however, from any offer made by counsel what the answer of the witness would have been, nor that they expected to contradict him if his answer had been in the negative. The witness had already stated that he had volunteered his evidence, thus evincing a willingness to see the defendant convicted; and if it be conceded that the ruling of the court was technically wrong as an undue restriction of the cross-examination, as we think it was, yet an affirmative answer would not have added further evidence of his interest. Evidently, since counsel did not prosecute the inquiry further or make an offer to prove, they were satisfied that they had obtained from the witness all the evidence they could showing interest. We think the ruling, though technically erroneous, was without prejudice.

The same witness in another place of his cross-examination testified: "Q. You don't know who fired them [the shots] of your own knowledge? A. I knew it was Fuller and Gallahan. Q. How do you know? A. Because I heard the people talking about it." Contention is made that this portion of his evidence is hearsay, and that the court erred in refusing to strike it out. The court did at first refuse to strike it out, but a few moments later, upon attention being called to it by counsel, the whole of it was stricken out and the jury admonished not to consider it. Further, the court submitted an instruction calling the attention of the jury specifically to the

fact that certain testimony had been stricken out and that they must bear this constantly in mind during their deliberations, and not make use of it in making up their verdict. The prior erroneous ruling was thus fully corrected and the contention of counsel is not sustained by the record.

The testimony of the undersheriff, touching his comparison of defendant's shoes with the footprints leading from the place of the shooting, together with the shoes, was admitted, over objection by counsel that the use of this character of evidence was a direct violation of the constitutional prohibition that "no person shall be compelled to testify against himself in a criminal proceeding" (Constitution, Montana, Article III, section 18), and also of the guaranty that "the people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures" (Constitution, Montana, Article III, section 7). Counsel also rely upon Articles V and IV of the amendments to the Constitution of the United States, which, respectively, embody substantially the same provisions.

We do not think the evidence shows that what was done by the undersheriff was without the defendant's consent. From this point of view the defendant may not complain; for the privilege guaranteed by the first provision of the Constitution cited may be waived by consent, either expressly or by implication. Otherwise a defendant who has offered himself as a witness in his own behalf would not be subject to cross-examination bringing out criminatory facts, should he conclude not to submit to it. The rule is, as pointed out by Mr. Wigmore in his work on Evidence (Vol. 3, sec. 2276), that when the defendant offers himself as a witness in his own behalf, he waives his privilege as to all matters pertinent to the issues involved. So, if the defendant consented to the use of his shoes, voluntarily surrendering them to the officer for the purpose for which they were used, he cannot now complain that the evidence so discovered was used against him. And these remarks apply as well to the guaranty of security in the other provision; for, if the shoes were taken by the defendant's consent,

he cannot be heard to complain that the officer was guilty of an unlawful seizure.

But, accepting the theory of the defendant that the evidence does establish a taking without his consent, we still think the evidence in question was properly admitted. The prohibition first invoked is nothing more than a statement of the common-law rule of evidence, and guarantees no greater privilege than that all persons, whether parties or extraneous witnesses, shall be free from compulsion by legal process to give self-incriminating testimony. After tracing the history of the rule, Mr. Wigmore states its object thus: "Looking back at the history of the privilege and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical court, as opposed through two centuries—the inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow-objectors, that he ought to be convicted by other evidence, and not by his own forced confession upon oath. Such too, is the inference from the policy of the privilege as a defensible institution; that is to say, it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions. Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence, for, if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status; if, in other words, it created inviolability not only for his physical control of his own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained

by forcibly overthrowing his possession and compelling the surrender of the evidential articles—a clear *reductio ad absurdum*. In other words, it is not merely compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion*. The one idea is as essential as the other. The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure sought by legal process against him as a witness.” (Section 2263, p. 3123.)

As further pointed out by this author, the privilege also extends to the production by a person of documents or chattels in response to a subpoena, or to a motion to order production, or to other forms of process treating him as a witness, because at any time he might be liable to be called upon to establish the identity, authenticity, or origin of the article produced. And this view is sustained generally by the courts. In New York it is held that it is no invasion of this privilege to compel the defendant to stand up in the presence of the jury so that he may be identified by a witness. “The main purpose of the provision [of the Constitution] was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime. It could reach further only in exceptional and peculiar cases coming within the spirit and purpose of the inhibition. A murderer may be forcibly taken before his dying victim for identification, and the dying declarations of his victim may then be proved upon his trial for his identification. A thief may be forcibly examined and the stolen property may be taken from his person and brought into court for his condemnation. A prisoner’s person may be examined for marks and bruises, and then they may be proved upon his trial to establish his guilt; and it would be stretching the constitutional inhibition too far to make it cover such cases and cases like this, and the inhibition thus applied would greatly embarrass the administration of justice.” (*People v.*

Gardner, 144 N. Y. 119, 43 Am. St. Rep. 741, 38 N. E. 1003, 28 L. R. A. 699.)

In Tennessee and Texas it is held in cases of larceny that, though a confession has been extorted from the defendant by fear of punishment or the hope of immunity and is therefore inadmissible, yet, if by means of information thus gained by the officers the stolen property is found, this fact is admissible, together with the further fact that the defendant informed them of its place of concealment; the knowledge thus evinced by him putting it upon him to give such explanation as he may exculpating himself. (*White v. State*, 3 Heisk. (Tenn.) 338; *Selvidge v. State*, 30 Tex. 60.) This is the rule in New York also. (*Duffy v. People*, 26 N. Y. 588.)

In *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493, the defendant was charged with larceny. Footprints were discovered at the scene of the crime and leading to and from it to a fence in the direction of defendant's house. The officer who made the arrest compelled the prisoner to put his foot in the tracks, thus demonstrating an exact correspondence. This was proved upon the trial, over defendant's objection. On review the court held the evidence admissible on the theory that, though the act of the officer was an invasion of defendant's rights, yet it did not affect the resemblance, the only fact which had weight as evidence.

Applying the same rule, the supreme court of Alabama, on a trial for arson, held that it was competent for the state to show that shoes taken from defendant's house and belonging to him were compared with tracks found near the scene of the crime, and were the same in length and breadth. (*Morris v. State*, 124 Ala. 44, 27 South. 336.)

The case of *Myers v. State*, 97 Ga. 76, 25 S. E. 252, is directly in point. There, as here, the officer in charge of the prison ordered the prisoner's shoes to be taken from him for the purpose of comparing them with tracks found near the place, where the body of the murdered man was discovered. The trial court excluded the evidence of the officer as to the result of the comparison, but failed to admonish the jury not to con-

sider it. On review it was held that the omission to admonish was not prejudicial, because the evidence was competent and should have been admitted, and the court remarked that "it was the duty of the officer to have taken from the possession of the defendant any article which he might have had that would throw any light upon the circumstances of his guilt or innocence, and preserve it for use at the trial." Similar instances of the application of the rule may be multiplied almost indefinitely. (*People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *England v. State*, 89 Ala. 76, 8 South. 146; *People v. Rowell*, 133 Cal. 39, 65 Pac. 127; *State v. Morris*, 84 N. C. 756; *People v. Keep*, 123 Mich. 231, 81 N. W. 1097; *Commonwealth v. Pope*, 103 Mass. 440; *Squires v. State*, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147.)

The cases of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, and *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, cited by counsel, are not opposed to the rule laid down by Mr. Wigmore and in the cases cited. Indeed, they are both cases in which criminatory evidence was sought to be extorted by compulsory process, in direct violation of the privilege.

There can be no controversy as to the general rule that footprints or other marks or tokens found upon or near the place of the crime may be admitted to connect the accused with it and identify him as the guilty person, if the evidence tends to show that he left such evidences behind him. (*People v. Mead*, 50 Mich. 228, 15 N. W. 95; *Harris v. State*, 84 Ga. 269, 10 S. E. 742; *Gray v. State*, 42 Fla. 174, 28 South. 53; *State v. Reed*, 89 Mo. 168, 1 S. W. 225; Underhill on Criminal Evidence, sec. 313; 1 Wigmore on Evidence, sec. 413.) Nor do we understand that it is in this case drawn in question by the defendant.

The guaranty of the state and federal Constitutions against unreasonable searches and seizures does not, as we understand it, establish a rule of evidence, but insures inviolability of the homes, persons, and effects of the citizens from unreasonable searches and seizures, or, in other words, searches and

seizures not authorized by law. Its purpose was and is to declare unlawful and prohibit the use of general warrants to search the homes of citizens and seize their books and papers and other effects, to be used against them as evidence in pending controversies. It grew out of the bitter contest between Wilkes and the English government in 1762 (*Wilkes' Case*, 19 How. St. Tr. 982), and was finally established as a part of the English Constitution by Lord Camden's decision in *Entick v. Carrington*, in 1765 (19 How. St. Tr. 1029). Both of these cases were actions for trespass against officers of the crown who had made or authorized indiscriminate searches and seizures of the plaintiffs' papers and other effects under general warrants. In neither of them, however, was the competency of the evidence thus found brought in question.

The provision in the state and federal Constitutions is therefore a limitation upon the powers of the respective governments declaring all searches and seizures unlawful and forbidding the legislature and the Congress to authorize them, when they do not fall within the limitation; and the redress for the wrong therein denounced is an appropriate action directly against those who have been guilty of trespass. Except where there is a violation of the rule prohibiting the enforced production of self-criminating testimony heretofore considered, the competency of the particular evidence is not affected by the means by which it has been obtained, and this rule has generally been recognized by the courts in the United States.

In *State v. Flynn*, 36 N. H. 64, the court said: "It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are in the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous

to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. If a party should have the power to keep out of sight, or out of reach, persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence which he has been compelled to furnish against himself. It is their own. It does not seem to us possible to establish a sound distinction between that case and the case of the counterfeit bills, the forger's implements, the false keys, or the like which have been obtained by similar means. The evidence is in no sense his." The defendant had been indicted for keeping for sale a quantity of intoxicating liquor, in violation of the statute. An officer had searched his premises under a warrant issued by the police magistrate of Manchester. On the trial, testimony as to what the officer thus ascertained was admitted, over objection. On review, the appellate court stated its views as quoted above.

In *Gindrat et al. v. People*, 138 Ill. 103, 27 N. E. 1085, plaintiffs in error were upon trial for larceny of a diamond ring. Objection was interposed to the testimony of one De Sell, who, the evening after the robbery and acting as a detective, but without a warrant or authority from anyone, went to the rooms occupied by the defendants and there discovered certain criminatory facts and seized certain articles of jewelry, which were admitted in evidence. The objection was that the evidence was incompetent for that the means by which it was obtained was violative of section 6 of the Constitution of Illinois, the same in substance as the provision of our own and the federal Constitution cited. After discussing the purpose and meaning of the provision the court said: "Courts, in the administration of the criminal law, are not accustomed to be oversensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent and pertinent and not subversive of some constitutional or legal right." The court quotes with approval from 1 Greenleaf on Evidence, as follows: "Though papers and other subjects of

evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."

The case of *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, was similar. The defendant was charged with grand larceny, by depriving the prosecutor of his money by means of a trick by substituting therefor worthless state bank bills. Upon his arrest he was searched and other bank bills of the same character were found upon his person. On the trial these were admitted in evidence in connection with the testimony of the officer making the arrest, over the objection of counsel that they were incompetent because possession of them had been gained by an invasion of the personal rights of the defendant and an illegal seizure. The court, in reply to this objection, said: "One complete answer to this is that if it was an illegal seizure, that is no objection to the use of the papers as evidence, they being proper evidence in the case in other respects; for the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would it form a collateral issue to determine that question [citing authorities]. But the seizure was not illegal, for the reason that these papers were instruments or tokens used by the defendant in the perpetration of the crime with which he is charged and with which he stood charged at the time they were taken from his person. There is such a thing as unreasonable search, which the law will not permit, but where a person stands charged with crime, and an instrument or device is found upon his person or in his possession which was a part of the means by which he accomplished the crime, those instruments, devices, or tokens are legitimate evidence for the state and may be taken from him and used for that purpose." We can see no valid distinction between these cases and the one at bar. The following cases are also in point: *People v. Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675, 68 N. E. 636, 63 L. R. A. 406; *Commonwealth v. Tib-*

betts, 157 Mass. 519, 32 N. E. 910; *State v. Mallett*, 125 N. C. 718, 34 S. E. 651; *Russell v. State*, 66 Neb. 497, 92 N. W. 751. (See, also, 3 Wigmore on Evidence, sec. 2264.)

Counsel for defendant cite *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, as conclusive of their contention. But we do not think it has any application. In that case the question before the court was the constitutionality of a statute which authorized a federal court in revenue cases on motion of the government to require the claimant to produce in court his books, invoices, or papers to be used as evidence against himself in order to declare a forfeiture. The legislation was declared repugnant to Amendments IV and V of the Constitution of the United States. In so far as the order required the production of self-criminatory matter, it was within the prohibition of the fifth amendment; but, as we have seen, its evidentiary value could not be affected by the fact that it was obtained by a trespass upon the rights guaranteed by the fourth amendment, notwithstanding the *dictum* in the majority opinion of the court to the contrary.

It is said that the court committed error in commenting upon the weight of the evidence in the presence of the jury during the progress of the trial. This contention is based upon a statement by the judge during the trial, with reference to a transcript of the evidence taken at the coroner's inquest which had been admitted in favor of the defendant for impeachment purposes, to the effect that the evidence had been admitted for "what it was worth." The judge should, during the course of the trial, refrain from remarks that are calculated in any way to influence the minds of the jury. This includes remarks to counsel touching the management of the case and reflecting upon their conduct, as well as those touching the character of the witnesses and the value of their testimony; and, if the remarks so made are material and improper, they may be prejudicial. Accordingly, if properly excepted to and brought into the record, they may work a reversal of the case on that ground. (Elliott on Appellate Procedure, sec. 671.) Jurors have great confidence in and respect for the presiding judge, and are vigi-

lant in their attention to whatever is said by him. He cannot be too careful in guarding his conduct in this regard. (*Cronkhite v. Dickerson*, 51 Mich. 177, 16 N. W. 371.) This is the common observation of all who have frequented the courts or have taken part in their proceedings. But, while this is true, it is not every remark so made that may be alleged as ground of error. The court is frequently called upon to rule on questions presented during the progress of the trial. In overruling objections to evidence, even if it is done in the briefest way, the decision necessarily is that such evidence is competent and has some weight; and if, in making the ruling, the remark is incidentally made that the evidence is admitted for what it is worth, this is no more than what is always impliedly said with reference to all the evidence in the case; for it is all admitted for what it is worth, and this, it would seem, is what each juror is presumed to understand. The same may be said of other rulings. We cannot think that the casual remark of the judge here made the subject of animadversion could have been understood as an expression of opinion as to the weight of the evidence, or that it prejudiced the defendant in any degree whatever.

Paragraph 13 of the charge deals with the subject of malice as a constituent element of the crime of murder. Complaint is made that it is erroneous. While it does not define the term "malice" in the exact words of the Penal Code (section 7), it is sufficiently comprehensive to give the jury a definite idea of its meaning, especially so in the absence of a request for a more specific instruction.

We do not think the defendant has any ground to complain of the court's definition of the expression "heat of passion." The jury found him guilty of murder of the first degree. Whether, therefore, the definition be correct or not, the jury could not have been misled by it. The finding that the killing was prompted by deliberately premeditated malice aforethought excluded the idea of heat of passion as an element requiring consideration (*State v. Sloan*, 22 Mont. 293, 56 Pac. 364), thus evincing the fact that the jury properly did not consider this

instruction at all. Besides, the facts proven at the trial did not tend to show a case of manslaughter. The defendant has no reason to complain of a charge which authorized the jury to find him guilty of manslaughter, when the evidence tended to show a case of murder.

It is also said that the instruction assumes the fact that the defendant did the killing. This contention is not maintainable. The instruction, standing alone, is free from fault in this regard; but it is especially so when it is taken together with the rest of the charge. (*State v. Rolla*, 21 Mont. 587, 55 Pac. 523; *Territory v. Hart*, 7 Mont. 502, 17 Pac. 718.)

Paragraph 20 of the charge, after quoting section 3123 of the Code of Civil Procedure, as to the credibility of witnesses and the method by which they may be impeached, proceeds: "If you find that any witness has testified willfully and deliberately false as to any material fact in this case, you are at liberty to disregard his entire testimony. And in this case, if the jury believe from the evidence that any witness has sworn willfully false to any fact material to the issue, they are at liberty to disregard the entire testimony of such witness, in so far as the same has not been corroborated by other credible evidence." The first sentence of the language quoted, standing alone, is erroneous, under the ruling laid down in *State v. De Wolfe*, 29 Mont. 415, 101 Am. St. Rep. 579, 74 Pac. 1084, and in *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648. As is said in the latter case, the power of the jury should be confined to the formulation of a judgment upon the evidence within the exercise of legal discretion, and in subordination to the rules of evidence. So, while they may disregard the testimony of a witness who has been guilty of deliberate perjury in a material matter, they may do so only in subordination to the limitation that there is no other corroborative evidence in the case entitled to credit. If there is such evidence, they may not disregard the entire story of the witness, but only the false statement. The language quoted, taken together, seems to have been an attempt on the part of the court to state, first, an abstract proposition of law, followed by a concrete application of it to the facts of the case.

But be this as it may, the verdict of the jury was obviously correct. The defendant introduced practically no testimony at all of a substantive character to establish a defense, such as alibi or self-defense, or to contradict the statements of the state's witnesses. His evidence was confined to an impeachment of the evidence introduced by the state. Under the circumstances, we think the jury were not misled by the erroneous statement in the first part of the paragraph quoted.

It is a familiar principle that an instruction, even if it be erroneous, will not be sufficient to set aside a verdict, if it is apparent that the jury were not misled thereby. As stated by Mr. Thompson: "Thus it is said that instructions faulty or technically erroneous will not work a reversal of the judgment if the jury were not misled, or if, as a whole, the case was fairly presented to them, and especially if their verdict is obviously correct." (Thompson on Trials, sec. 2431.) Under the circumstances of this case, though the instruction is technically erroneous, it is not apparent that the jury could have been misled by it, though the general rule is, as has always been recognized by this court, that contradictory instructions are sufficient to reverse the judgment. (*State v. Sloan*, 22 Mont. 293, 56 Pac. 364; *State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362.)

In instruction No. 24 the court charged the jury as follows: "The court instructs the jury that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, and if the defendant does not claim the right to be sworn and does not testify, this fact must not be used to his prejudice." Criticism is made of this part of the charge for that it comments upon and calls the attention of the jury to the fact that the appellant did not testify, and also informed the jury that the appellant might have testified had he so desired, but that the state could not compel him to do so. The defendant was not sworn as a witness. This fact was apparent to the jury. The court was perhaps not bound to instruct the jury with reference to this fact. It was entirely proper, however, if the court chose to do so, to inform the jury, as it did, that the fact

that the defendant failed to testify could not be used to his prejudice. In any event, the instruction was favorable to the defendant, and for that reason he has no right to complain of it.

With reference to the instructions requested and refused, it is sufficient to say that they are all fairly covered by the instructions submitted, which are full, fair, and, generally speaking, applicable to the facts proven. We find no error which we think was prejudicial to the defendant.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: I concur in the conclusion and in all of the opinion, except that portion in regard to the shoes of the defendant. What is said in the opinion in that regard is ably stated, comprehensive and, I think, correct in a proper case; but I consider it all unnecessary in the case before us, for the reason that it does not appear whether the shoes were taken from the defendant by his consent or not. As said in the statement of facts in the opinion: "The evidence is that the undersheriff told the jailer to get defendant's shoes, and that he went and took them off defendant in the corridor of the jail where he then was." If the prisoner gave them up willingly—and there is nothing in the evidence to show that he did not, and there is nothing in the record that implies that he did not—then the argument in the opinion in regard to the shoes is entirely unnecessary. It is sufficient, in my opinion, to say that the point raised by counsel for the defendant in respect of the shoes does not appear to be well taken, for the reason that there is not any evidence in the case supporting his contention or tending to support it.

STATE, RESPONDENT, v. LU SING, APPELLANT.

(No. 2,263.)

(Submitted February 27, 1906. Decided March 19, 1906.)

Criminal Law—Homicide — Information — Evidence — Admissions — Instructions — Verdict — Sentence — Presumptions—Judicial Notice.

34	31
36	428
34	31
38	454

Murder—Information—Form—Misspelling.

1. *Held*, under Penal Code, sections 1842 and 2600, that an information alleging that defendant feloniously, willfully and of his (defendant's) "*deliberately*" premeditated malice aforethought, committed the homicide in question, was not fatally defective because of the mere misspelling of the word "*deliberately*."

Murder—Information—Sufficiency—Appeal.

2. The question of the sufficiency of an information charging homicide may be raised for the first time in the appellate court.

Murder—Information—Sufficiency.

3. To support a judgment of conviction of murder of the first degree, it is not necessary that the information should allege that the acts which resulted in the homicide were done deliberately, the allegations sufficient for a common-law indictment sufficing for an information in this regard.

Murder—Witnesses—Competency—Chinaman—Ability to Tell Nature of Oath.

4. A Chinaman who, upon being tested as to his competency as a witness, stated that he could tell what he knew and that what he would say would be the truth, but that he did not know the nature of an oath, was qualified to testify under Code of Civil Procedure, section 3161, he not falling within the exceptions noted in section 3162, as amended (Laws 1897, p. 245), or those mentioned in section 3163 of the same Code.

Murder—Evidence—Admissions—Competency.

5. Where, in a prosecution for murder, the peace officer who took the defendant, a Chinaman, into custody, testified that on his way to jail the latter attempted to converse with him, but that he only understood a portion of what he said, reciting the part so understood by him, it was not error for the trial court to refuse to strike out all of the witness' testimony relative to the conversation on an objection that, since he had not understood all he should not be permitted to testify to a portion only, it appearing that the court had properly cautioned the jury as to the weight to be given by them to this character of evidence.

Murder—Objections to Evidence—Form.

6. An objection to questions asked defendant, charged with murder, on cross-examination that the evidence sought was "*incompetent, irrelevant, immaterial and not cross-examination*" was too general, where it was apparent that the evidence sought was material.

Murder—Instructions—Commenting on Evidence.

7. An instruction requested by defendant, accused of homicide, that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, "affords a strong presumption of innocence," was properly refused, it being misleading and an invasion of the province of the jury.

Murder—Verdict—Time for Pronouncing Sentence—Statutes.

8. A verdict of guilty of murder of the first degree was returned on November 10, 1905. On the day following judgment was pronounced, over objection of the defendant that under section 2210 of the Penal Code he was entitled to two full days after the rendition of the verdict, before sentence. *Held*, that the court may not pronounce judgment before the expiration of two days after rendition of the verdict, provided the term of court lasts that long; otherwise the time of pronouncing judgment must be postponed to a date as remote as can reasonably be fixed within the current term of court.

Murder—Time for Pronouncing Sentence—Presumptions.

9. When two days did not intervene between the rendition of a verdict of guilty in a capital case, and the pronouncement of judgment (Penal Code, sec. 2210), it will be presumed on appeal, in the absence of anything in the record to the contrary, that the court did not remain in session after the date on which the judgment was pronounced.

District Courts—Terms—Judicial Notice.

10. Judicial notice will be taken by the supreme court of the fact that there are two or more counties in a certain judicial district in this state, that such district court has fixed terms, expiring at certain periods, and that the court is not open for the transaction of business at all times as in a district embracing one county only.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

LU SING was convicted of murder of the first degree. He appeals from the judgment and from an order denying him a new trial. Affirmed.

Mr. J. L. Staats, for Appellant.

The word "deliberately" has no meaning whatever, whether legal or otherwise, and as deliberation is an essential element of murder in the first degree, the information does not support the judgment of conviction in this case. (*People v. Doyell*, 48 Cal. 85.)

Again, section 1947 of the Penal Code provides and implies that the defendant may be convicted of an offense necessarily included in the offense charged. If the information, then, is

insufficient as to the main offense, no lower degree of the crime charged is included by our statute. At most the defendant could only be convicted of murder in the second degree. (*People v. Callaghan*, 2 Idaho, 156, 9 Pac. 414, and cases cited.)

Purported confessions of the defendant do not go to the weight of the testimony, but it is a question for the court. (*People v. Ah How*, 34 Cal. 218. See, generally, *State v. Kilburn*, 16 Utah, 187, 52 Pac. 277; Greenleaf on Evidence, sec. 214; *State v. Buster*, 23 Nev. 346, 47 Pac. 194.) The latter lays down the same rule, and while in that case the court held that if the confession is corroborated by other witnesses, the error was harmless, but in this case the testimony of witness Williams as to the statement of defendant to him on the way to jail was not corroborated by anyone, and the testimony of Robertson and Williams as to the statements of defendant at the jail were not corroborated by anyone else, and they do not testify alike in that respect.

In view of the fact that the court gave instruction No. 23 on the subject of motive, it was error for that reason. if for no other, to refuse to give the requested instruction. The state impliedly conceded in instruction 23 that there was no motive shown by the testimony, and while if there had been none given by the state on the question of motive, it might well be doubted whether the defendant was entitled to have the requested instruction given, but inasmuch as instruction 23 was given, and no other instruction was given as the equivalent of the refused instruction, it is well settled that it is error for the court to refuse to give it. (*State v. Foley*, 144 Mo. 600, 46 S. W. 733; *Clough v. State*, 7 Neb. 344; *Vaughan v. Commonwealth*, 85 Va. 672, 8 S. E. 584; Hughes' Instructions to Juries, secs. 264, 781.) The refusal to give said instruction was error in any view of the case, and this court can review the same, regardless of the evidence in the cause. (*State v. Mason*, 24 Mont. 340, 61 Pac. 861; *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505.)

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY, delivered the opinion of the court.

Lu Sing was convicted of murder of the first degree, and appeals from the judgment and from an order denying him a new trial.

1. It is contended by appellant that the information does not charge any higher offense than murder of the second degree, and therefore does not support the judgment. The information charges that the acts by which the homicide were committed were done "feloniously, willfully, and of his [defendant's] *deliberatedly* premeditated malice aforethought." The word "deliberatedly" is used repeatedly instead of "deliberate," as employed in the Code. (Penal Code, sec. 352.) It is urged that the word "deliberatedly" is wholly meaningless, and without some appropriate word importing deliberation the information does not charge murder of the first degree, and that this question may be raised in the supreme court for the first time.

So far as the question of procedure is concerned, we think appellant is correct. (*Territory v. Young*, 5 Mont. 242, 5 Pac. 248; *Territory v. Duncan*, 5 Mont. 478, 6 Pac. 353.) But we are not satisfied that by reason of the poor spelling—the mere insertion of the letter "d" between the letter "e" and the letters "ly" of what was evidently intended to be the word "deliberately"—the information is rendered fatally defective as one charging murder of the first degree; for, even assuming that it is necessary to allege the facts which distinguish murder of the first degree from murder of the second degree, in order to sustain a conviction of murder of the first degree, still, we think that no one could have been misled as to the meaning of this information. The authorities are practically unanimous in holding that an error of this character will not vitiate the information. (*Lefler v. State*, 122 Ind. 206, 23 N. E. 154; *Terrell v. State*, 41 Tex. 463; *State v. Williamson*, 43 Tex. 500; *State v. Smith*, 63 N. C. 234; *State v. Myers*, 85 Tenn. 203, 5 S. W. 377;

12 Cyc. 761.) Furthermore, sections 1842 and 2600 of the Penal Code provide:

"Sec. 1842. No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

"Sec. 2600. Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

If the word "deliberately" had been used, the information would not have been couched in the most elegant English, but the objection now made could not have been urged seriously; and, while the evident purpose of the pleader was to use the word "deliberately," we think the mere misspelling of it does not render the information defective. "When the context and subject matter are taken into consideration, the word intended to be used cannot be misunderstood." (*State v. Williamson*, 43 Tex. 500.)

Under a statute similar to the one now in force it has been held by this court that it is not necessary to allege that the acts done were done deliberately in order that the information may be sufficient to sustain a conviction of murder of the first degree. It is still held that allegations sufficient for a common-law indictment will be sufficient for an information. (*Territory v. Stears*, 2 Mont. 324, approved in *Territory v. McAndrews*, 3 Mont. 158, and in *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182.) The same rule is also announced in *People v. De La Cour Soto*, 63 Cal. 165.

2. One Mar Quong, a Chinaman, was called as a witness on behalf of the state, but before testifying was tested as to his competency as a witness by defendant's counsel. It is now contended that, upon the showing made, defendant's objection to the witness testifying should have been sustained. The examination of the witness related principally to his religious belief. He

testified in the first instance that he knew the nature of the oath he had taken, but, after being cross-examined at some length, said that he did not. He said he could tell what he knew, and that what he would say would be true. He testified that he believed in the Christian religion and knew that the Christian God is a supreme being. He also stated that he did not know what kind of an oath is administered in the courts in China.

Section 3161 of the Code of Civil Procedure provides: "All persons, without exception, otherwise than as specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section 3123." The witness does not come within any of the exceptions noted in section 3162 as amended (Laws 1897, p. 245), or in section 3163, and was apparently competent under section 3161. We do not find any authority for applying the test sought to be applied in this case, namely, the ability of the person offered as a witness to "tell the nature" of the oath administered to witnesses in the courts of this state. So far as this record discloses, there was not any attempt to show that the witness did not understand the obligation of his oath or the penalty for perjury.

3. E. H. Williams, a policeman in the city of Bozeman, who arrested the defendant soon after the homicide was committed, testified for the state, over the objection of the defendant, to a part of a conversation which took place between himself and the defendant on their way to, and at, the city jail. The witness testified that the defendant spoke English very poorly, and that he could not understand all that defendant said, but did understand the defendant's statement: "If I kill him, me good man. If I no kill him, no good." And again: "If me no kill him, me no good man; and if Tom Sing dead, me die happy." Defendant moved to strike out the testimony of the witness, on the

ground that he had not understood all that the defendant said to him and ought not to be permitted to testify to a portion only. The motion was denied, and error is predicated on this ruling. In support of his contention counsel for appellant cites *People v. Gelabert*, 39 Cal. 663, decided in 1870, and *State v. Buster*, 23 Nev. 346, 47 Pac. 194, decided in 1896.

The opinion in *People v. Gelabert* is very brief and cites no authorities in support of the conclusion reached. The reason given for the conclusion goes to the weight, rather than to the competency, of the evidence. 1 Greenleaf on Evidence, section 214, is cited, not, however, in support of the conclusion reached by the court, but in support of the oft-repeated declaration of courts and text-writers that evidence of extrajudicial confessions should be received with great caution, because of the danger of mistake of the witness arising from his misapprehending what the defendant said, his unintentional misuse of a particular word; or, if the witness does not remember the exact words used by the defendant, his failure to express in his own language the meaning intended to be conveyed by the defendant; and, finally, because of the infirmity of memory. But all of this is directed to the weight, rather than the competency, of the evidence, and it is well for the trial court to warn the jury as to the caution to be exercised respecting this character of evidence (Code Civ. Proc., sec. 3390, subd. 4) as indicated above, as was fully done by the trial court in this case.

The case of *State v. Buster* is of no weight as a precedent, for the reason that, while the supreme court of Nevada holds that the evidence given by the witness Cozzens, who could not understand all the defendant said, was incompetent, the error in receiving it was, nevertheless, cured by the fact that other witnesses, who did fully understand what the defendant said, corroborated the testimony of Cozzens, apparently overlooking the fact that the jury might have believed the witness Cozzens, and refused absolutely to believe the other witnesses, who corroborated him, with the result, if the court's conclusion was right in the first instance, that the defendant was convicted upon evidence held to be wholly incompetent.

No fault is found with the authorities which hold that where the state offers only a part of the conversation embodying a confession, the defendant has a right to have the whole of the conversation before the jury; but the great weight of authority and reason hold that merely because a witness did not hear all of the conversation, or did not understand it all, does not render incompetent what he did hear or understand. The evidence goes to the jury for what it is worth. Its value may be greatly impaired by the fact that the witness heard or understood only a part of what was said. But where the jury is cautioned, as was done in this case, there can be no error in the reception of the evidence, merely because the witness can give only a portion of what was said. (*Westmoreland v. State*, 45 Ga. 225; *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814; *State v. Elliott*, 15 Iowa, 72; *State v. Moelchen*, 53 Iowa, 310, 5 N. W. 186; *State v. Madison*, 47 La. Ann. 30, 16 South. 566; *State v. Vallery*, 47 La. Ann. 182, 49 Am. St. Rep. 363, 16 South. 745; *State v. Daniels*, 49 La. Ann. 954, 22 South. 415; *Commonwealth v. Pitsinger*, 110 Mass. 101; 3 Wigmore on Evidence, sec. 2100; Wharton's Criminal Evidence, sec. 688.) Long after the decision in *People v. Gelabert* was rendered, the supreme court of California held to this same doctrine announced by the courts above. (*People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Dice*, 120 Cal. 189, 52 Pac. 477.)

There cannot be any reason advanced for the admission of the testimony of witnesses who heard only a part of a conversation which will not apply equally to the testimony of a witness who heard it all but only understood or remembered a portion of it. We think the evidence was properly admitted.

The same objection is made to the testimony of the witness John Robertson; but the record does not support the contention. So far as disclosed, the witness Robertson understood the defendant and detailed all the conversation which he had with him.

4. Objections were made to certain questions asked the defendant on cross-examination, and errors are predicated upon

the refusal of the court to sustain them. We are not prepared to say that the court's rulings were erroneous, even had the objections been more specific; but the fact is that the objection in every instance was that the evidence sought was "incompetent, irrelevant, immaterial and not cross-examination." The evidence was certainly material. The objections were too general and were properly overruled. (*State v. Black*, 15 Mont. 143, 38 Pac. 674.)

5. The defendant offered an instruction, numbered 2, as follows: "If the evidence fails to show any motive on the part of the accused to commit the crime charged in the information, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict. The absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence." It was refused. The first sentence of the instruction correctly states the law, but the second sentence renders the whole instruction erroneous: a. In that it would necessarily confuse the jury by leading them to infer that after they had come to a conclusion that there was a reasonable doubt as to who committed the murder, they must still pursue their investigation of the case further; b. In that it would have been highly improper for the trial court to have said that certain evidence "affords a strong presumption of innocence." Whether the presumption is strong or otherwise is for the jury to determine, and any comment upon the weight of the evidence by the court is an unwarranted invasion of the province of the jury. (*State v. Sullivan*, 9 Mont. 177, 22 Pac. 1088; *State v. Gleim*, 17 Mont. 29, 52 Am. St. Rep. 655, 41 Pac. 998, 31 L. R. A. 294.)

6. The verdict was returned on November 10, 1905, and judgment was pronounced on November 11, 1905, over objection of the defendant that he was entitled to two full days after the rendition of the verdict, before sentence. Section 2210 of the Penal Code provides: "After a plea or verdict of

guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the court intend to remain in session so long; but if not, then at as remote a time as can be reasonably allowed." Counsel for appellant construes this section to mean that in any event the defendant is entitled to two full days after the verdict is rendered before judgment is pronounced, and, if the court is not to remain in session for that length of time, then judgment must be pronounced at a subsequent general or special term. Of course, if appellant's construction of this section is correct, this judgment was pronounced prematurely. But we do not agree with counsel in his construction of the section.

The section means that the defendant is entitled to two days after the verdict is returned before judgment is pronounced, provided the term of court lasts that long. But, if the term is not to continue for two days after the verdict is returned, then the time for pronouncing judgment shall be postponed to a date as remote as can reasonably be fixed within the then current term of court. Whether this was done in this instance does not appear from the record. The burden of showing error rests upon the appellant, and, in the absence of anything in the record indicating that the court was to remain or did remain in session after November 11th, this court must presume that the district court did its duty; at least, the presumption will not be indulged that a substantial right of the defendant was invaded or denied. The minutes of the court should have shown that, when the court fixed the time for pronouncing judgment, it also announced that court would not remain in session longer than the time so fixed, if that was done. This court takes judicial notice of the fact that there are two counties in the ninth judicial district, and that the court has fixed terms, which, of necessity, must expire at certain

periods, and that the court is not open for the transaction of business at all times, as in a district having but a single county.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

STATE, RESPONDENT, v. BEESSKOVE, APPELLANT.

(No. 2,254.)

(Submitted February 26, 1906. Decided March 19, 1906.)

*Criminal Law—Murder—Appeal—Information—New Trial—
Jury—Evidence—Instructions.*

Criminal Law—Motion in Arrest of Judgment—Appeal.

1. An appeal from an order overruling a motion in arrest of judgment does not lie on behalf of defendant. (Penal Code, sec. 2272.)

Same—Denial of Motion in Arrest—How Reviewable.

2. An order overruling a motion in arrest of judgment is an intermediate order, reviewable on appeal from the judgment. (Penal Code, sec. 2321.)

Same—Information—Sufficiency—Venue—Motion in Arrest.

3. The sufficiency of an information, with reference to the allegation of the venue of the crime, may be attacked for the first time by motion in arrest of judgment.

Same—Information—Allegation as to Time and Place.

4. Allegations of time and place of the commission of the crime charged in an information are of the substance of the charge and must be so alleged, in ordinary and concise language, as to enable a person of common understanding to know what is intended by the charge.

Same—Information—Allegation as to Place of Offense.

5. In an information for murder the only mention of the county in which the crime was committed appeared in the caption describing the court in which, and the officer by whom, the charge was preferred. In the charging part of the document the word "county" was not used at all, and the only reference words found there were in the expression "then and there," the first of which referred to a preceding date alleged as the date of the crime, while the latter indicated some place, not described, where the defendant then was. *Held*, that, in the absence of an expression such as "in the county aforesaid" or "said county," thus referring to the caption, the information did not allege the county in which the offense had been committed, and that the district court committed error in overruling a motion in arrest of judgment interposed by defendant.

34	41
35	503
34	41
138	311
34	41
39	471

Same—New Trial—Misconduct of Jury—Affidavits of Jurors.

6. *Held*, that affidavits of two jurors, filed in aid of a motion for new trial by defendant in a prosecution for murder, in which both stated that they had misunderstood the instructions of the court (which explicitly and clearly charged the jury that they could find the accused guilty of any grade of unlawful homicide or acquit him), in that from a reading of them they were under the impression that the jury was required to either find the defendant guilty of murder in the first degree or acquit him, and that, being unwilling to acquit, they voted for murder in the first degree rather than to declare him innocent, did not, under Penal Code, section 2192, show such misconduct on the part of the jury as to entitle defendant to a new trial.

Same—Witnesses—Cross-examination—Undue Restriction.

7. Where a witness, on a trial for homicide, testified that he and accused had had trouble, but denied that he had ever tried to frighten him, it was error to exclude a question on cross-examination as to whether he had not told any of the witnesses that he had done so, though the question did not call the witness' attention to the time and place of the alleged statements so as to lay a foundation for impeaching evidence under Code of Civil Procedure, section 3380.

Same—Trial—Instructions—Witnesses.

8. In a prosecution for murder, it was error for the district court to refuse to charge the jury that in determining the weight to be given to the testimony of witnesses, the jury had a right to consider their appearance on the stand, their manner of testifying, their apparent candor or lack of it, their apparent fairness and means of knowledge, together with all the facts and circumstances in the evidence; and such error was not cured by submitting, in place of the requested instruction, the language of section 3123 of the Code of Civil Procedure, supplemented by the words, that they were at liberty to disregard the testimony of any witness who had willfully and deliberately testified falsely to any material matter, unless corroborated.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

K. F. W. BEESKOVE was convicted of murder of the first degree. From the judgment of conviction and from an order denying him a new trial, he appeals. Reversed.

Mr. A. J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondent.

The district court is a court of general jurisdiction and has jurisdiction in a homicide case, and the information contains all the allegations necessary to charge a deliberate, premeditated killing of a human being with malice aforethought; hence the court had jurisdiction of the subject matter, and the facts stated are sufficient to show affirmatively that a public offense had been committed. The defendant, by failing to demur and

by making no objection to the introduction of testimony by which the venue was clearly established, waived his right to object to these alleged defects in the information. (Penal Code, sec. 1930; Cal. Penal Code, 1886, sec. 1185, and notations; *Nichols v. People*, 40 Ill. 395, in connection with Ill. Rev. Stats. 1874, sec. 411, p. 408; and see *People v. Mead*, 145 Cal. 500, 78 Pac. 1047.) The caption and upper marginal title are parts of the information. (Penal Code, sec. 1833; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *State v. S. A. L.*, 77 Wis. 467, 46 N. W. 498; *State v. Shull*, 40 Tenn. 42; *State v. Delay*, 30 Mo. App. 357; *Sanderlin v. State*, 21 Tenn. 315; *State v. Reid*, 20 Iowa, 413.)

The real objection urged to this information is that it does not allege that this offense was committed in Missoula county, Montana. We find that this county is named three times: once in the caption, once in the "upper margin," and once in the body of the information. We also find that the offense was alleged to have been committed on the twenty-second day of June, 1905, and that in the charging part of the information the phrase "*then and there*" occurs six times. The words "*then and there*," as used in the information, are words of reference, and refer back to the date and place last specified. The place last specified in this information is Missoula county, Montana; the date last named is June 22, 1905. (*Wright v. Commonwealth*, 82 Va. 183; *State v. Shull*, 40 Tenn. 42; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *State v. Reid*, 20 Iowa, 417; *Commonwealth v. Butterick*, 100 Mass. 12, 97 Am. Dec. 65; *State v. Williamson*, 81 N. C. 540; *State v. Salts*, 77 Iowa, 193, 39 N. W. 167. See, also, *Commonwealth v. Williams*, 149 Pa. St. 54, 24 Atl. 158; *Foster v. State*, 19 Ohio St. 415; 10 Ency. of Pl. & Pr. 524; *Dean v. State*, 8 Tenn. (Cooper's ed.), 128.) The caption of a case consists of: (a) The title and designation of the court; (b) The title of the cause. The title of the cause contains the names of the parties litigant; the title of the court locates the action. Under the provisions of section 1833 of the Penal Code, the title of the court, in Montana, is made a necessary part of the body of the information and

the facts therein stated need not afterward be repeated, but may be referred to by appropriate words, such as "then and there" or "aforesaid," etc. Section 2600 of the Penal Code is a curative statute intended to cure just such defects in an information as that alleged by the appellant in this case.

Again, the court and the defendant were bound to take notice of the fact that William L. Murphy was the county attorney of Missoula county, and was not the county attorney of any other county. It is very apparent from all these facts and law above stated, that this alleged "defect or imperfection in matter of form" did "not tend to the prejudice of a substantial right of the defendant upon its merits." (Penal Code, sec. 1842.)

The jury is an entity, and if one juror is disqualified, or is guilty of misconduct, it vitiates the jury as a whole. (*State v. Mott*, 29 Mont. 292, 74 Pac. 728.) If the fact that one juror testifying that he did not understand the instructions is sufficient to disqualify him or make him guilty of misconduct, this would vitiate the entire jury and nullify the verdict. The effect of this would be to place all verdicts at the mercy of any single juror and make it possible for any juror to set aside a judgment of conviction at any time he reached the conclusion, either with or without design, that he did not understand the instructions. If the sworn secrecy of the jury-room and the almost universal exclusion of the affidavits of jurors incriminating themselves or their fellows has any application, it should apply to this case. (28 Am. & Eng. Ency. of Law, 1008; *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917.) This principle is mentioned but not discussed in *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038. It is also adverted to in *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 903; *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452 and note, 34 Pac. 185.

Mr. Harry H. Parsons, and Mr. S. G. Murray, for Appellant.

The caption and commencement are technically not a part of the information, and we cannot legally couple them with and tie them to the body of the information in order that we may find, upon the *whole* instrument, a possible intendment to charge and lay the venue. At the common law, in the federal courts and in many states the rule is uniform that each has its special function to perform separate and apart from the other. This is shown by the fact that at common law the prohibition against any amendment of the indictment did not apply to the caption or commencement, and this for the very plain reason that they were not a part of it. In the federal courts, where amendment of an indictment is absolutely prohibited because violating the Fifth Amendment to the Constitution, the caption or commencement may be amended, and indeed, almost done away with, if the body of the indictment contains proper averments. In all courts the caption and commencement "are exempt from that rigor which obtains even now in matters of substance against amendments only, because they are so wholly outside and apart from the indictment itself," they not being a part of it, but only an outside record relating to it. (*United States v. Howard*, 132 Fed. 325.) There are cases where courts hold that any defect or insufficiency in the caption or commencement may be aided by any statement found on the face of the indictment, "but they give no support to the converse of the proposition." (*United States v. Howard*, 132 Fed. 325; *McBean v. State*, 3 Heisk. 20.) Or the caption or preamble may be looked into at times to aid a defective description of the grand jury. (*State v. Buralli*, 27 Nev. 41, 71 Pac. 532.) Or to find in what court the information was filed. (*Dean v. State*, Mart. & Y. 127; *United States v. Howard*, 132 Fed. 325.) Or one count may refer to another to avoid unnecessary repetition, and the effect of such reference is to incorporate the matter into the incomplete count. (*Crane v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.)

Neither the record, nor the evidence, is subject to inspection to determine whether or not an information is sufficient. The sufficiency or insufficiency is determined always by the instrument itself. (*State v. Tully*, 31 Mont. 365, 78 Pac. 760; *People v. McConnell*, 82 Cal. 620, 23 Pac. 40; *Brown v. Massachusetts*, 144 U. S. 573, 12 Sup. Ct. 757, 36 L. Ed. 546.)

So much for the caption and preamble; by themselves they stand for and mean nothing more. Do they, *per se*, charge defendant with a crime? They say: "With the crime of murder committed as follows." Adding the phrase "crime of murder" is no part of the offense, nor does it constitute or form any part of the charge, although required to be inserted by section 1833 of the Penal Code. (*State v. Anderson*, 3 Nev. 254; *State v. Davis*, 41 Iowa, 311; *State v. Wyatt*, 76 Iowa, 328, 41 N. W. 31; *State v. Dehart*, 109 La. 570, 33 South. 605; *State v. Culbreath*, 71 Ark. 80, 71 S. W. 254; *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698.) "The rules of criminal pleading forbid that resort should be had to inference, however reasonable, to interpret the language of a formal charge, where certainty is demanded by statute." (*State v. Eddy* (Or.), 81 Pac. 941; *Moline v. State*, 67 Neb. 164, 93 N. W. 228; *State v. Ashpole*, 127 Iowa, 680, 104 N. W. 281.)

That time and place must be laid in the body of the indictment or information is the law in the great majority of the states, while under the common law there is no important exception. As to the necessity under the common law, see the following: 1 Chitty on Criminal Law, 132, 196, 200; 4 Durn. & E. (4 Term Rep.) 490; 5 Durn. & E. (5 Term Rep.) 162; Archibald on Criminal Pleading, 12; Yel. 94; Cro. Eliz. 97, 2 Hawkins' Pleas of the Crown, c. 25, No. 77; 2 Hale's Pleas of the Crown, 180; 4 Com. Dig., "Indictment," 670; 4 Maule & S. 215; *Commonwealth v. Springfield*, 7 Mass. 9, 13. The rule is the same in all federal jurisdictions. (*Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377; *United States v. Marx*, 122 Fed. 964; *United States v. Howard*, 132 Fed. 325.)

The rule is practically unanimous that venue must be laid in the indictment or information in all the states in this country, except where some special statute provides that the venue laid in the caption, etc., shall be taken as that where the crime is alleged to have been committed, as in Alabama, Arkansas, Louisiana, Iowa, Maryland, Michigan, Missouri, Ohio, Tennessee, and in later years, Texas, etc. The following cases are in point: *People v. O'Neill*, 48 Cal. 257; *People v. Craig*, 59 Cal. 370; *People v. Wong Wang*, 92 Cal. 281, 28 Pac. 270; *People v. Webber*, 133 Cal. 623, 66 Pac. 38; *Evans v. State*, 17 Fla. 192; *Connor v. State*, 29 Fla. 455, 30 Am. St. Rep. 126, 10 South. 891; *McKennie v. State*, 29 Fla. 565, 30 Am. St. Rep. 140, 10 South. 732; *State v. Ellison*, 49 W. Va. 70, 38 S. E. 574; *Earley v. Commonwealth*, 93 Va. 765, 24 S. E. 936; *Territory v. Freeman*, McCahon, 56, 1 Kan. (2d ed.) 491; *State v. Hinkle*, 27 Kan. 308; *McKoy v. State*, 22 Neb. 418, 35 N. W. 202; *Guston v. People*, 61 Barb. 35; *Geston v. People*, 4 Lan. 487; *Crichton v. People*, 40 N. Y. (1 Keyes) 341, 1 Abb. App. Dec. 467, 6 Park. Crim. Rep. 363; *People v. Horton*, 62 Hun, 610, 17 N. Y. Supp. 1; *State v. Beebe*, 83 Ind. 171; *Kennedy v. Commonwealth*, 6 Ky. (3 Bibb) 490; *McBride v. State*, 29 Tenn. (10 Humph.) 615; *Field v. State*, 34 Tex. 39; *Searcy v. State*, 4 Tex. 450; *State v. Slack*, 30 Tex. 354; *State v. Johnson*, 32 Tex. 96; *Williams v. State*, 38 Tex. Cr. App. 377, 43 S. W. 115; *Territory v. Doe*, 1 Ariz. 507, 25 Pac. 472; *State v. Williams*, 4 Ind. 234, 58 Am. Dec. 627; *Nicholson v. State*, 18 Ala. 529, 54 Am. Dec. 168; *Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377; *United States v. Marx*, 122 Fed. 964; *United States v. Howard*, 132 Fed. 325; *contra*, *State v. S. A. L.*, 77 Wis. 467, 46 N. W. 498.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was, upon his plea of not guilty to an information charging him with murder, found guilty of murder in the first degree, and by the judgment of the court was condemned to death. He has appealed from the judgment and from an

order denying him a new trial. He has also attempted to appeal from the order of the court overruling his motion in arrest of judgment. The integrity of the judgment is questioned upon the grounds: That the court erred in overruling defendant's motion in arrest of judgment, in the admission and exclusion of evidence, in giving and refusing instructions to the jury; that the jury were guilty of misconduct; and that the verdict is contrary to the law and the evidence.

1. Touching the attempted appeal from the order overruling the motion in arrest of judgment, it is sufficient to say that no appeal lies from such an order on behalf of defendant. (Penal Code, sec. 2272.) It is an intermediate order which may be reviewed on appeal from the judgment, and not otherwise. (Penal Code, sec. 2321.)

2. The principal question submitted for decision arises out of the contention of counsel for defendant that the information does not contain sufficient substantial allegations to give the court jurisdiction of the offense of which the defendant was convicted. It is said that no venue is laid in the information, and for that reason it was insufficient to put the defendant upon his defense.

The information, omitting formal parts, is as follows: "In the district court of the fourth judicial district, in and for Missoula county, Montana, on this 6th day of September, A. D. 1905, in the name and on behalf and by the authority of the state of Montana, K. F. W. Beesskove is accused by the county attorney of Missoula county, Montana, by this information of the crime of murder in the first degree, committed as follows: That said K. F. W. Beesskove did, on or about the 22d day of June, A. D. 1905, willfully, deliberately, feloniously, premeditatedly and of his malice aforethought, make an assault in and upon one William Burring, and a certain gun then and there loaded with gun-powder and leaden ball, and by him the said K. F. W. Beesskove then and there had and held, he, the said K. F. W. Beesskove, did then and there feloniously, willfully, deliberately, premeditatedly and of his malice aforethought,

shoot off and discharge at, upon and against the said William Burrig, with intent then and there to kill and murder the said William Burrig, and with the leaden balls out of the said gun so shot off and discharged, he, the said K. F. W. Beeskove, did then and there feloniously, willfully, deliberately, premeditatedly and of his malice aforethought strike, penetrate and wound the said William Burrig, thereby inflicting in and upon the body of said William Burrig a mortal wound, of which the said mortal wound the said William Burrig did then and there die. All of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state of Montana."

The sufficiency of the information was not challenged by demurrer, nor during the trial by other appropriate method, the question now submitted being first presented in the case by motion in arrest of judgment. This course saved the adverse ruling for review by this court, however, if under the law the allegation of venue is jurisdictional, and if, further, it cannot be understood from the allegations in the information before us that the crime sought to be charged was committed in Missoula county.

It is well settled upon reason and authority that the circumstances of time and place are of the substance of the charge, though, as to the time, it is sufficient if it is charged that the offense was committed at a time prior to the finding of the indictment or the filing of the information. If the time is an essential ingredient of the offense, the allegation must be precise. This was the rule at common law (4 Blackstone's Commentaries, 307), and has prevailed in the several states of the Union, except where by statute the specific allegation of venue has been declared not essential (*State v. Shull*, 40 Tenn. 42; Shannon's Code, Tenn. 1896, sec. 7088), or where the venue stated in the margin or caption is declared sufficient after verdict (*Nicholas v. People*, 40 Ill. 395; *State v. De Lay*, 30 Mo. App. 357; *State v. Simon*, 50 Mo. 370). Mr. Bishop, in his text, declares this to be the rule and cites the cases generally

in support of it. (3 Bishop's Criminal Procedure, 360, and cases collected in note.) The reason of the rule is that the local jurisdiction of the crime is in the county where it is committed, and the charge must show that fact; furthermore, the defendant is entitled to know the cause of the accusation, so that he may prepare his defense. (Const., Art. III, sec. 16.)

While in this state much of the particularity required at the common law has been dispensed with, and no defect or imperfection in form, which does not prejudice the substantial rights of the defendant, can affect a judgment of conviction (Penal Code, secs. 1842, 2600), still time and place are essential elements and must be so alleged as to enable a person of common understanding to know what is intended by the charge (Penal Code, sec. 1832). This is apparent from the provisions of section 1841 of the Penal Code; for among them is the requirement that the indictment or information shall, with the exception stated, allege that the offense was committed within the jurisdiction of the court and at a time prior to the finding of the indictment or the filing of the information. If it be borne in mind that the common law is in force in this state, except so far as it has been supplanted by our Codes, the conclusion cannot be escaped that the provisions of the Penal Code cited (sections 1832, 1841, 1842), and others germane to the subject, while dispensing with mere matters of form, still require all the substantial allegations necessary under the common-law rule.

Does the information before us meet the requirements of this rule? The only mention of the county is found in the caption in the description of the court in which, and of the officer by whom, the charge is preferred. In the charging part the word "county" is not used at all. The only reference words found there are in the expression "then and there." The first of these evidently refers to the preceding date alleged as the date of the crime, while the other as clearly refers to some place where the defendant then was, the description or designation of which has been omitted. If such an expression as "in

the county aforesaid," or "said county," or the like, had been used, the reference to the caption would have been clear and unequivocal, and any person of common understanding would at once conclude that the pleader meant to say that the offense was committed in Missoula county. As it is, it is only by the merest inference that one who has had experience in such things would reach this conclusion.

Under the statute, the charge must be in ordinary and concise language, and so direct as to enable, not those of learning and experience, to understand it, but the man of ordinary understanding (section 1832, *supra*); for the purpose of the information is not only to state jurisdictional facts, but to inform a man of ordinary understanding what the charge is. We do not think that the information in this case meets these requirements, and therefore conclude that the district court was in error in not granting the motion in arrest of judgment. The result is that the judgment must be reversed, and the cause remanded for a new trial.

3. In aid of the motion for new trial, the defendant filed the affidavits of two jurors, in which both stated in effect that they did not understand the instructions of the court; that, after reading them, they were of the impression that they required the jury to find the defendant guilty either of murder of the first degree or to acquit him; and that, being of the opinion that he should not be acquitted, they voted for the verdict of murder of the first degree, rather than declare him innocent. It is insisted by counsel for defendant that these affidavits show such misconduct on the part of the jury as to entitle the defendant to a new trial on the ground of such misconduct.

While there is some contrariety in the decisions of courts upon the question whether jurors should be heard to impeach their own verdict, we think reason and great weight of authority condemn the practice which permits it. (See 29 Am. & Eng. Ency. of Law, 1008, 1009, with notes.) In any event it should not be tolerated further than the statute permits.

(Penal Code, sec. 2192.) This section provides for the one exception, namely, cases where the verdict has been decided by lot, or by any means other than a fair expression on the part of all the jurors. In such case the impeaching affidavit may be made by members of the jury. (Code Civ. Proc., sec. 1171.) This express exception, under the rule "*expressio unius est exclusio alterius*," it would seem excludes all other exceptions. Early in the history of the state, the supreme court of California declared it to be the rule, founded on necessary policy, that such affidavits cannot be admitted to impeach a verdict. (*People v. Baker*, 1 Cal. 404.) This rule was adhered to until 1862, when the legislature provided for the single exception of the case where the verdict was founded by a resort to chance. With this modification, the rule now prevails. (*People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *People v. Soap*, 127 Cal. 408, 59 Pac. 771.) The sections of our statute cited were adopted from that state, and, since the interpretation given to them embodies the better rule, we approve and adopt it. Beyond this the court ought not to receive such evidence, for the obvious reason that, after the verdict has been rendered, members of the jury would be subject to all sorts of influences intended to induce them to repent of their decision and lend their aid in having it revoked. They might even be tampered with and corrupted so that the integrity of the verdict would rest, not upon the integrity and honesty of the jury during their deliberations, but upon their susceptibility to such influences after their duties have been faithfully performed under their oaths. The case at bar illustrates the danger such practice invites. The court explicitly and clearly instructed the jury, in one paragraph of the charge, that they could find the defendant guilty of any grade of unlawful homicide or acquit him, according to their view of the evidence under their oaths. After reaching a verdict they were brought into court, and through their foreman returned it, all of them answering to their names and concurring therein. Several weeks later two of them solemnly swore that they understood that the instruction meant

that they should convict the defendant of murder in the first degree or acquit him, leaving them no alternative. Very naturally, the question at once arises: What influenced these men to do this? Why did they keep silent so long? Had they so read the instructions as they swear they did, and forgotten them? Their statements could not be contradicted. The result is that, if their affidavits were to be heard, the court could not do otherwise than grant a new trial on the statements made in them. We think the court properly rejected them as not competent.

4. The court's rulings upon the admission and exclusion of evidence were correct except in one instance. The homicide was the culmination of a dispute as to the ownership of certain wood, the defendant insisting that it was on ground within the boundaries of his homestead claim on the public land. He had controversies with all of his neighbors as to his rights—among others with one Franklin—and seems to have entertained the idea that the deceased with Franklin and others were engaged in a conspiracy to drive him from the settlement. Franklin was called as a witness to prove that the wood was entirely outside of defendant's boundaries. Among other things, he testified in chief that he and the defendant had had trouble, but denied that he had ever tried to frighten him. On cross-examination he was asked if he had not told one of the other witnesses that he had done so. He was not permitted to answer. The question as put did not call the attention of the witness to the circumstances of time and place of his alleged statement, so as to lay the ground for the introduction of contradictory evidence, under the statute (Code Civ. Proc., sec. 3380); it was nevertheless legitimate cross-examination, and an answer should have been permitted. (*Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884.)

5. The defendant requested an instruction to the effect that, in determining the weight to be given to the testimony of every witness, the jury had a right to consider his appearance on the stand, his manner of testifying, his apparent candor or

lack of it, his apparent fairness and means of knowledge, together with all the other facts and circumstances appearing in the evidence. The court failed to submit this and gave instead section 3123 of the Code of Civil Procedure, supplemented by an addition to the effect that, if the jury believed that any witness had willfully and deliberately testified falsely to any material matter, they were at liberty to disregard his testimony entirely, except so far as it was corroborated by other credible evidence in the case. The instruction requested should have been given. It called the attention of the jury particularly to matters which they should consider in weighing the testimony, and the defendant had a right to have this done. In other respects, we think the charge was full and fair, covering all the phases of the case.

6. Though counsel contended earnestly that the verdict is contrary to the evidence, we think it sufficient to go to the jury, and, though it is conflicting in important particulars, we cannot say that their finding thereon was wrong.

The judgment and order are reversed, and the district court is directed to grant the defendant a new trial.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

FRIEL, RESPONDENT, v. KIMBERLY-MONTANA GOLD MINING COMPANY, APPELLANT.

(No. 2,238.)

(Submitted January 12, 1906. Decided March 19, 1906.)

*Master and Servant—Mines—Safe Place to Work—Nonsuit—
New Trial—Statement—Rules of Court.*

Mines—Personal Injuries—Safe Place to Work—Nonsuit—New Trial.

1. *Held*, in a suit for personal injuries, that the district court erred in sustaining a motion for nonsuit made at the close of plaintiff's case, where the evidence introduced tended to show, and for the purposes of the motion did prove, that plaintiff, a miner, had been injured by falling rock and that defendant had failed to keep the "place," already created and completed, in which plaintiff was at work, safe and secure.

Mines—Personal Injuries—Safe Place to Work.

2. A miner does not assume the risks incident to his employment which flow from his employer's failure to exercise reasonable care to keep the "place," already created and completed, in which the former is at work, safe and secure.

New Trial—Statement—Sufficiency.

3. The fact that a statement on motion for a new trial, in a suit for personal injuries, was denominated, by the moving party, "a statement of the case and bill of exceptions," did not render it objectionable; it being immaterial what a paper is called.

New Trial—Statement—Settlement—Presumptions.

4. Where the record is silent as to what steps were taken to procure the settlement of a statement on motion for a new trial, the presumption will be indulged that it was settled according to law.

Appeal—Record—New Trial—Statement—Rules.

5. Rule VII, section 3, of the Rules of the Supreme Court, provides that *unless otherwise ordered by the district court*, the testimony contained in the transcript shall be reduced to narrative form. In a statement on motion for a new trial presented for settlement to the district court, extensive portions of the testimony were produced by question and answer. Objection made to this by the adverse party was overruled. *Held*, that the action of the court in overruling the objection was equivalent to an order to have the matter appear in the form it did.

District Courts—Rules—New Trial—Statement—Appeal.

6. A rule of the district court provided that the lines and pages in a statement on motion for a new trial should be numbered. To the settlement of a statement in the preparation of which this rule had been ignored, a technical objection was interposed and overruled. *Held*, that, since counsel did not invoke this rule for the purpose of facilitating labor in the settlement of the statement and making certain what was done respecting amendments, the supreme court on appeal will not interfere.

District Court—New Trial—Statement—Rules.

7. Rules of district courts relative to preparation and arrangement of statements on motion for new trial and bills of exceptions are not made for the purpose of punishing a delinquent party, but to aid counsel and court and to make certain what is done.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

ACTION by Mack Friel against the Kimberly-Montana Gold Mining Company. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

Mr. T. J. Walsh, Mr. W. S. Hartman, Mr. A. P. Stark, and Mr. Charles Klotz, for Appellant.

The determination of this case is controlled by the law as laid down in *Shaw v. New Year Gold Mines*, 31 Mont. 138, 77 Pac. 515, which is that for injuries occurring by reason of continual changing conditions in the very place in which the ser-

vant is working, he cannot recover, and that such conditions arise by reason of the negligence or omission of some one in authority makes no difference. There is no escape from the logic of this decision. If the foreman in that case, and with reference to the duty devolving upon him under the conditions there detailed was a fellow-servant of the decedent, indisputably so was the foreman in this case with reference to the duty claimed to have been omitted by him to notify the plaintiff of the unlagged condition of the "back" of the stope at the top of the set of timbers under which he was working when he was injured.

The place in which plaintiff was working was in process of change. It was left incomplete on the day before, presumably because the shift of men working on it expired before they were able to complete it. It was to be picked up and carried on and completed in the regular course and conduct of the work. The case presents a condition of affairs differing radically in principle from many of those like *Union Pacific Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433, referred to with approval by this court in *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273.

Although, perhaps, sufficient is said in *Shaw v. New Year Mines* to make clear the principle by which is determined whether a duty is nondelegable, as appertaining to the obligation to furnish a reasonably safe place, or whether the person to whom it is intrusted remains, whatever his rank, a fellow-servant, we refer to the following recent decisions on the subject: *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162, 33 Atl. 1102; *Cleveland etc. Ry. Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *O'Connell v. Clark*, 22 App. Div. 466, 48 N. Y. Supp. 74; *Petaja v. Aurora etc. Min. Co.*, 106 Mich. 463, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435; *Consolidated etc. Min. Co. v. Clay's Admr.*, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; *Oleson v. Maple Grove*

Coal Min. Co., 115 Iowa, 74, 87 N. W. 736; *Mielke v. Chicago etc. Ry. Co.*, 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22; *Smith v. Hecla Min. Co.*, 38 Wash. 454, 80 Pac. 779; *Finalyson v. Utica M. & M. Co.*, 67 Fed. 507, 14 C. C. A. 492; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021; *De Vito v. Crage*, 165 N. Y. 380, 59 N. E. 141; *Capasso v. Woolfolk*, 163 N. Y. 472, 57 N. E. 760; *McLaine v. Head etc. Co.*, 71 N. H. 294, 93 Am. St. Rep. 522, 52 Atl. 545, 58 L. R. A. 462.

Messrs. Wallace & Donnelly, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal from an order granting a new trial, a motion for nonsuit having been made and granted. Plaintiff sustained personal injuries on August 21, 1903, while employed in the quartz mine of defendant, and the action was brought to recover damages.

The evidence for the plaintiff, which, for present purposes, must be taken as true, shows that plaintiff was employed by the defendant about August 4, 1903, and worked until the time he was injured. On August 20th, the day before he was hurt, the plaintiff, an experienced miner, had worked on the top or fourth floor of the mine at his regular business as miner. On the morning of the day of the accident he was directed by the shift boss to go with another to the third floor and help the shovelers. He had never before been directed to shovel, and he had never before shoveled on the floor below where he had mined. He obeyed the order, and with three others commenced to shovel on the said floor. While thus at work the floor upon which he was standing was sixteen feet below the roof or "back" of the fourth floor, from which roof the rock fell which injured him. Above his head the roof of the third floor, which constituted the floor of the fourth floor, shut out from his view, and from the view of the men working with him, all the conditions obtaining upon the floor above. He did not at any time on the day on which he was injured go to the floor above, and no one of the men with him went there. The rock fell because

there was no lagging under it to support it. The timbers were up and the cross-timbers in place, but the lagging had not been put upon them. This had been the condition since the afternoon before. In the meantime another shift had worked, and the breast of the stope had been carried far enough to allow one or more sets of timbers to be put in. The unlagged timbers, in the usual course of mining, should have been lagged. No one had been set to work on the fourth floor under the unlagged place on the morning of the injury, and there was no one there at the time of the accident. A mass of rock fell from the unsupported roof of the fourth floor crashing through the timbers and lagging of the roof of the third floor above plaintiff's head and struck him, causing the injuries of which he complains.

The plaintiff contends that the defendant did not, as in duty bound, use reasonable care, or any care, to furnish a safe place in which he should work. Defendant charges contributory negligence and argues that the spot from which the rock fell was not a "place," but a place in course of construction, and that the plaintiff was engaged in co-operation with the miners who were overhead in the construction of said place, and therefore assumed all the risk incident to the making thereof.

The testimony tends to show, and for the purposes of the motion did show, that it was the custom, as well as the duty, of the master to follow closely behind the miners working at the breast and to timber the floor and lag the same in order to protect all parties working in the vicinity.

If, as the evidence also tends to show, the part of the stope from which the rock fell was one in which the mining had been completed, it was the duty of the defendant to timber and lag the same in order that that part of the place, already created, might be kept safe. If the plaintiff had been injured while in the actual work of making a place—and the evidence tends to show that he was not—then he could not recover from the company, for he would assume the obvious risks of his occupa-

tion. But he did not assume the risk following defendant's failure to exercise reasonable care to keep that part of the place already created safe and secure, if it did thus fail.

Objection is made by appellant to a consideration by this court of any evidence on the part of the witnesses of plaintiff tending to show that the duty of the company was in respect of timbering that particular part of the stope. We have examined the evidence, and think that a *prima facie* case was made for the plaintiff, and that the court should not have withdrawn the case from the jury. We are of the opinion that the case of *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273, covers the law of the case as presented by the evidence introduced by plaintiff.

The appellant made certain technical objections to the allowance and settlement of the statement on motion for a new trial. These objections were incorporated in the record and are before us. One point is that the document, which we have heretofore called "a statement on motion for new trial," is denominated by the plaintiff "a statement of the case and bill of exceptions," and that, as appellant says: "There is no authority in law for combining in one instrument a bill of exceptions and statement on motion for a new trial, and it is impossible to tell whether the plaintiff seeks to settle the bill of exceptions as provided in section 1155 of the Code of Civil Procedure, or statement on motion for a new trial as provided in subdivision 3 of section 1173 of the Code of Civil Procedure." As to this matter, suffice it to say that it is immaterial what a paper is called. We look to the paper itself to see what it is. This is a statement on motion for a new trial. The manner of settling a bill of exceptions and that of settling a statement on motion for a new trial seem to us to be the same. Moreover, there is not anything in this record to show what steps were taken to procure the settlement, and we must necessarily assume that it was settled according to law.

A further objection made, saved and urged by appellant is, that the statement should not have been settled "because the

said bill of exceptions and statement on motion for new trial is not reduced to the narrative form, and extensive portions of the testimony are, without reason, reproduced by question and answer."

So far as the objection that extensive portions of the testimony are reproduced by question and answer is concerned, we find that much of the evidence has been so presented in the statement. Under a rule of this court (Rule VII, subsection 3, 30 Mont. xxxiv, 82 Pac. viii), the testimony contained in the statement on motion for a new trial or the bill of exceptions should be reduced to narrative form, unless the court below order otherwise. Objection, as we have seen, was seasonably made in the court below to the form in which the testimony was produced. The court overruled the objection, and we consider that this is an order by the court to let it be in the form of question and answer as it appears.

The further technical objection was made and saved that in the statement the lines were not numbered, and that the pages were not numbered after page 45. Under a certain rule of the district court in which the case was tried, the statement was required to be paged and the lines numbered. The purpose of this rule, of course, is to furnish to the party upon whom the statement is served ready means of preparing such amendments as he may see fit to propose, and to aid the court in comparing the same in case of dispute as to the question of amendments. When the reason of the rule fails, the rule falls. One rule of this court requires transcripts to be indexed; but if a transcript consisted of only one page, we would not listen to an objection that the transcript was not indexed. Counsel in this case submitted fifty-seven amendments, and they were allowed by the court. Neither the counsel nor the court invoked the rule to facilitate labor. Rules of the sort referred to are not made for the purpose of punishing anyone, but to aid counsel who may invoke them for the purpose of avoiding unnecessary labor and to make certain what is done.

We find no error in the record, and the order of the court granting the motion for new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

BOWEN, RESPONDENT, v. WEBB, APPELLANT.

(No. 2,228.)

(Submitted February 27, 1906. Decided March 19, 1906.)

Appealable Orders—Default—Vacation—Judicial Notice—Discretion—Attorneys—Presumptions.

Default—Vacation—Appealable Order.

1. Under section 1722 of the Code of Civil Procedure, as amended by Session Laws of 1899, page 146, an order, made before final judgment, refusing to set aside a default is not appealable.

District Courts—Rules—Judicial Notice.

2. The supreme court will not take judicial notice of the provisions of rules of the district court.

Default—Vacation—Discretion—Appeal.

3. The granting or refusing to grant a motion to set aside a default being within the sound legal discretion of the trial court, the burden rests upon appellant to show a manifest abuse of such discretion by the court in denying a motion of this character.

Default—Motion to Vacate—Grounds.

4. To justify the granting of a motion to vacate a default, defendant must show that he proceeded with diligence; that the default occurred through his excusable neglect; that the judgment, if permitted to stand, will affect him injuriously; and that he has a defense to plaintiff's cause of action on the merits.

Default—Motion to Vacate—Attorneys—Press of Business.

5. Affidavits submitted on an application to open a default, showing merely a press of business engagements on the part of defendant's attorney, which called him out of his office a great deal of the time, and caused him to mistake the day on which he was required to make his appearance, cannot be said to establish excusable neglect.

Default—Affidavit of Merits—Practice—Demurrer.

6. A default will not be vacated merely to permit the defendant to file a demurrer to the complaint, but the application must be accompanied by an affidavit showing a defense to the plaintiff's cause of action upon the merits.

Default—Affidavit of Merits—Answer.

7. *Quære*: May an answer, when properly identified, sufficient in form and offered for that purpose, perform the office of an affidavit of merits requisite to an application to open a default?

Default—Affidavit of Merits—Answer—Presumptions.

8. Where, on appeal from an order denying a motion to open a default so as to permit defendant to file a demurrer to the complaint, the bill of exceptions recited that the motion had been heard upon the

34	61
136	412
34	61
337	480
38	418

complaint, motion and affidavits, it will not be presumed that a proffered answer, which was neither identified nor referred to as a paper offered in support of the motion, was considered by the court as an affidavit of merits.

Appeal—District Courts—Rulings—Presumptions.

9. Every presumption in favor of rulings of the district court will be indulged in the appellate court.

Appeal—Error—Presumptions.

10. Error will not be presumed: it must be made to appear affirmatively.

Appeal from District Court, Carbon County; Frank Henry, Judge.

ACTION by Ellen Bowen against Samuel Webb. From a judgment denying a motion to set aside a default judgment in favor of plaintiff and permit defendant to file a demurrer to the complaint, he appeals. Affirmed.

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE OPINION.

In this case there is an appeal to this court from a judgment by default rendered in the district court of Carbon county on May 8, 1905, and an attempted appeal from an order of the district court refusing to set aside the default, which order was made on February 21, 1905. This action was commenced on January 21, 1904. Service of summons was made by delivering a copy thereof, together with a copy of the complaint, to the defendant, personally, on January 22, 1904. On February 15th following, the defendant having failed to make any appearance in the case, on application of counsel for plaintiff, the clerk in the district court entered the default of the defendant, and thereafter plaintiff made proof, and judgment was rendered and entered in her favor according to the prayer of her complaint. On February 15th, after the default, and before judgment had been entered, defendant's attorney filed a motion to set aside the default and permit him to file a *demurrer* to the complaint. This motion recites that it is made upon the papers in the case and the affidavit filed with it. The motion was accompanied by an affidavit of the attorney for the defendant, to the effect that he had been employed on January 28th to

make appearance for defendant in this case; "that by reason of mistake and inadvertence as to the time within which said appearance must be made, affiant failed to make such appearance by demurrer or answer."

On February 16th the defendant served upon the attorney for plaintiff a proposed answer, which had been offered for filing on February 15th, after the default had been entered; but no reference whatever is made to this proposed answer in any of the defendant's moving papers. On March 1, 1904, counsel for defendant filed another affidavit of himself in support of the defendant's motion to set aside the default. This second affidavit recites that the default was entered by the clerk when court was in session, contrary to a rule of that court; but the rule is not set forth. This affidavit alleges that the failure of the defendant to appear within the time allowed by law "was occasioned by and due to an unusual amount of business engagements, calling affiant out of his office a great deal during said time after the case had been brought to him and his services had been engaged by the defendant, and prior to the first day of the regular February term of court; and that by reason of the consequent confusion of his business affiant mistook the day upon which he must file appearance of the defendant in the case." The bill of exceptions recites that the motion to set aside the default came on for hearing before the court on February 21, 1905, on the complaint, motion, and affidavits, and was overruled.

Mr. John B. Clayberg, and *Mr. W. F. Meyer*, for Appellant.

The policy of our law is to allow all actions to be tried on their merits, if possible, and where a defendant fails to answer or appear within the time limited, and default is taken against him and he moves promptly to set it aside, so that if set aside the plaintiff will not be delayed in the trial of his action, the discretion vested in district courts should be exercised to allow the defendant to appear and answer, and have his case tried upon the merits. (*Benedict v. Spendiff*, 9 Mont. 85, 22 Pac. 500; *Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181; *Heardt*

v. *McAllister*, 9 Mont. 405, 24 Pac. 263; *Watson v. San Francisco etc. R. R. Co.*, 41 Cal. 20; *Miller v. Carr*, 116 Cal. 378, 58 Am. St. Rep. 180, 48 Pac. 324; *Harbaugh v. Honey Lake etc. Co.*, 109 Cal. 70, 41 Pac. 792; *Buell v. Emerick*, 85 Cal. 116, 24 Pac. 644; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Dodge v. Ridenour*, 62 Cal. 263; *Francis v. Cox*, 33 Cal. 323; *Howe v. Independence etc. Co.*, 29 Cal. 72; *Reidy v. Scott*, 53 Cal. 69; *Hitchcock v. McElrath*, 69 Cal. 634, 11 Pac. 487; *Simkins v. White*, 43 W. Va. 200, 27 S. E. 241; *Mason v. McNamara*, 57 Ill. 274; *Horton v. New Pass Gold etc. Co.*, 21 Nev. 184, 27 Pac. 376, 1018; *Haggarty v. Walker*, 21 Neb. 596, 33 N. W. 244; *O'Brien v. Leach*, 139 Cal. 220, 96 Am. St. Rep. 105, 72 Pac. 1004; *Savings Bank v. Schell*, 142 Cal. 505, 76 Pac. 250.)

Mr. George W. Pierson, for Respondent.

One is not entitled to relief from every mistake, inadvertence, surprise or neglect, but only where the facts shown are such as would make a denial of the motion an abuse of discretion and where no reasonable excuse is shown the application to set aside the default will be denied. (*Herbst Importing Co. v. Hogan*, 16 Mont. 385, 41 Pac. 135; *Thomas v. Chambers*, 14 Mont. 424, 86 Pac. 814; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac. 456; *Elliott v. Shaw*, 16 Cal. 378; *Williamson v. Cummings etc. Co.*, 95 Cal. 652, 30 Pac. 762; *Rust v. Baird*, 109 Ill. App. 41; *Baltimore etc. R. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N. E. 923.) Facts must be stated on application to set aside default, so that the court may determine whether relief should be granted. (*Sherman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863; *Barra v. People*, 18 Colo. App. 16, 69 Pac. 1074.) Defendant was bound to show that he had a meritorious defense. Hearsay affidavits of merit will not be considered. (*Jenkins v. Gamewell etc. Co.* (Cal.), 31 Pac. 570.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

1. The order, made before final judgment, refusing to set aside the default is not an appealable order. (Section 1722 of

the Code of Civil Procedure, as amended by an Act of the Sixth Legislative Assembly [Session Laws, 1899, p. 146].)

2. This court does not take judicial notice of the provisions of rules of district courts. (Code Civ. Proc., sec. 3150.)

3. The granting or refusing to grant a motion to set aside a default is within the sound legal discretion of the trial court, and the appellant here assumes the burden of showing facts which made the denial of his motion a manifest abuse of that discretion. (*Briscoe v. McCaffery*, 8 Mont. 336, 20 Pac. 691; *Blaine v. Briscoe*, 16 Mont. 582, 41 Pac. 1002; *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635; *Eakins v. Kemper*, 21 Mont. 160, 53 Pac. 310; 6 Ency. of Pl. & Pr. 163, and cases cited.)

4. In order to justify the district court in granting the motion, the defendant was required to show (a) that he proceeded with diligence, which may be conceded; (b) his excusable neglect; (c) that the judgment, if permitted to stand, will affect him injuriously, and that he has a defense to the plaintiff's cause of action upon the merits.

So far as defendant's affidavits attempt to make out a case of excusable neglect, at most it may be said they show merely a press of business engagements on the part of defendant's attorney which called him out of his office a great deal of the time, and by reason whereof he made a mistake in the day upon which he was required to make appearance. We are not prepared to say that this showing was sufficient in this respect to justify the court in setting aside the default. Frequently it has been held to be insufficient. (*Thomas v. Chambers*, 14 Mont. 423, 36 Pac 814; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac 456; *Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135.)

While the law allows a defendant twenty days after service of summons upon him, within which to appear in the action, it does not require him to defer his appearance until the last day, and when he does so he assumes the risk of his delay, if in fact he miscalculates the time.

It has been held uniformly that the defendant must present in support of his motion to set aside a default an affidavit of

merits; that is, an affidavit showing a defense to the plaintiff's cause of action upon the merits. (*Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887.) A default will not be vacated to permit the filing of a demurrer. Conceding that a proffered answer, if identified and offered for that purpose and sufficient in form, may perform the office of an affidavit of merits, we are met, in this instance, with the recital in the bill of exceptions that the trial court heard the motion upon the complaint, motion and affidavits. Nowhere is the proffered answer referred to as a paper offered in support of the motion. It is not identified at all, while the motion itself seeks to have the default set aside in order that the defendant may demur to the complaint. In view of the declared purpose of this motion, and in view of the recital in the bill of exceptions above, and in the absence of anything to show affirmatively that the proposed answer was offered as an affidavit of merits, we cannot presume that it was considered by the trial court, and, in its absence, there is not anything presented by way of an affidavit of merits, and, of course, a trial court would not grant the motion without such affidavit. Every presumption in favor of the district court's ruling will be indulged in this court. Error will not be presumed. It must be made to appear affirmatively.

We have examined the other questions presented by appellant, but there does not appear to be merit in them.

We think this record fails to disclose any error. The appeal from the order overruling the motion to set aside the default is dismissed, and the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

STATE EX REL. CRUMB, RELATOR, v. CITY OF HELENA
ET AL., RESPONDENTS.

(No. 2,229.)

(Submitted February 28, 1906. Decided March 26, 1906.)

*Telephones—Regulation of Business—Constitutional Law—
Statutes—Municipal Corporations—Highways.*

Telephones—Construction and Maintenance—Constitution—Self-executing Provisions.

1. Section 14, Article XV of the Constitution granting to any person or corporation the right to construct or maintain telegraph and telephone lines within this state, and providing that the legislature shall by general law enact reasonable regulations to give full effect to such grant, is not self-executing.

Telephones—Poles and Fixtures—Highways—Obstruction—Constitution.

2. In the absence of legislation making the grant contained in section 14, Article XV of the Constitution, relative to the right of any person to construct and maintain telegraph and telephone lines within this state, effective, the placing of poles and other fixtures, necessary for such business, in the public highways would constitute an unlawful obstruction thereof.

Telephones—Construction—Highways—Constitution—Statutes.

3. Any Act placed upon the statute books in obedience to the command of the Constitution (Article XV, section 14), that such reasonable regulations shall be provided by law as to give full effect to the grant contained in said instrument conferring the right to place poles and other fixtures, necessary for the carrying on of a telegraph or telephone business in the public highways, upon any person or corporation wishing to engage in it, must not only be a general one of uniform operation, but one which will give full, not partial, effect to such constitutional grant.

Telephones—Construction—Municipal Corporations—Highways—Constitution—Statutes.

4. Held, that Chapter LV of the Session Laws of 1905 (Laws of 1905, p. 122), authorizing any person or corporation desirous of engaging in the telegraph, telephone, electric light or power business, to construct the necessary poles and appliances along and upon any of the public highways, but adding that "the provisions of this Act shall not apply to public roads and highways within the limits of incorporated cities or towns," is, as to this proviso, invalid, in that by its insertion the carrying on of such business would practically be confined to country districts, contrary to the purpose of the constitutional grant (Article XV, section 14) with respect to this subject.

Telephones—Construction—Cities and Towns—Highways—Statutes.

5. Subdivision 43 of section 4800 of the Political Code, as amended by Session Laws of 1897, page 203, which confers upon city or town councils the power to regulate the erection of poles, the stringing of wires, etc., within the corporate limits, does not supplement Chapter LV of the Laws of 1905 (Laws of 1905, p. 122), so as to render valid

the proviso of the latter Act, to-wit, that the right granted to persons desiring to engage in the telegraph or telephone business to erect the necessary appliances in the public highways does not apply to roads and highways within the limits of cities or towns, since upon failure of such body to legislate upon the subject, it may not be coerced into action.

Telephones—Construction and Maintenance—Regulation—Cities and Towns.

6. *Obiter*: After the legislature has complied with the constitutional mandate to provide by general law such reasonable regulations as will give full effect to the grant authorizing the construction and maintenance of telegraph and telephone lines within the state (Constitution, Article XV, section 14), it may empower cities and towns to enact such reasonable regulations for the conduct of such business as may be considered necessary.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

MANDAMUS by the state, on the relation of W. H. Crumb, against the mayor and city council of the city of Helena, to compel respondents to designate places for the erection of poles for a telephone system. From a judgment of dismissal, the relator appeals. Reversed.

Mr. E. C. Day, for Respondents.

Appellant contends that Chapter LV of the Acts of 1905 is unconstitutional, for the reason that if the court gives effect to the proviso of that Act it makes of incorporated cities and towns a separate class, and therefore the law is not uniform. This court in the case of *State ex rel. Telephone Co. v. Mayor*, 30 Mont. 338, 76 Pac. 758, construed the term "public roads" as used in Civil Code, section 1000, to include "streets" in cities and towns, because the legislature "has not attempted to make of streets a separate class of highways." But the Act of 1905 does attempt to make of streets in incorporated cities and towns a separate class. The Act of 1905 grants a general right of way for poles and wires over highways outside of incorporated cities and towns. The effect of the proviso is to make operative section 4800, subdivision 43, Political Code, by which the city or town council in incorporated cities and towns is given power "To regulate or suppress the erection of poles and the stringing of wires, rods or cables in the streets, alleys or within

the limits of any city or town." So that the legislature has provided for both classes of cases, by laws of uniform operation upon each particular class.

Is this classification unconstitutional? The classification of roads into those outside of incorporated cities and those inside of such cities, each to be governed by laws applicable to the respective class, does not violate the constitutional requirement of uniformity. The leading case upon this subject in Montana is the capital election case of *State ex rel. Lloyd v. Rotwitt*, 15 Mont. 29, 37 Pac. 845, where the court lays down the rule that a law is not unconstitutional which is general and uniform in its operation upon all persons in like situations, citing with approval *McAunich v. Mississippi etc. Ry. Co.*, 20 Iowa, 343. This is now the approved exposition of the law of uniformity as required by constitutional provisions. (*Ex parte Smith*, 38 Cal. 702; *Dougherty v. Austin*, 94 Cal. 633, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161; *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, and cases cited.)

In view of the great development in the use of electricity in cities and towns, laws subjecting persons or corporations, engaged in the business of supplying electrical currents, to a stricter regulation in cities and towns than in the country are neither unreasonable nor arbitrary. (Cogswell on Law of Electricity, sec. 162 et seq.; *American Repid Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 674, 26 N. E. 919, 13 L. R. A. 454; *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820.)

Mr. M. S. Gunn, for Appellant.

The Act amending section 1000 by reason of the proviso exempting streets in cities and towns is not uniform, and is obnoxious to the provisions of section 14 of Article XV of the Constitution. It necessarily follows that either the proviso is invalid or the entire Act is unconstitutional. It would seem that the entire amendatory Act is unconstitutional, for the reason that to eliminate the proviso would be to extend the opera-

tion of the Act beyond what the legislative assembly intended. (*Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Pollock v. Farmers' etc. Co.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *Johnson v. State*, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373; *Ames v. People*, 25 Colo. 508, 55 Pac. 725; *State v. Sheriff*, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; *Union County Nat. Bank v. Ozan Lumber Co.*, 127 Fed. 206; *In re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 693; Cooley's Constitutional Limitations, 7th ed., p. 246 et seq.)

If the entire Act is unconstitutional, then section 1000 of the Civil Code is still in force, because an unconstitutional Act is of no validity whatever and does not operate to repeal a law which it was intended to supersede. (*Campeau v. City of Detroit*, 14 Mich. 276; *Tims v. State*, 26 Ala. 165; *People v. Fleming*, 7 Colo. 230, 3 Pac. 70; *Copeland v. City of St. Joseph*, 126 Mo. 417, 29 S. W. 281; *State v. Hallock*, 14 Nev. 202, 33 Am. Rep. 559; *Barringer v. City Council*, 41 S. C. 501, 19 S. E. 745; *In re Rafferty*, 1 Wash. 382, 25 Pac. 465; *State v. County Judge*, 11 Wis. 50; *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624, 26 N. E. 778, 11 L. R. A. 370.)

It is immaterial, however, whether this court takes the view that the proviso is invalid, or the entire Act is unconstitutional. When the proviso is rejected the remainder of the section is the same as section 1000 of the Civil Code.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In April, 1905, this appellant, W. H. Crumb, made demand upon the mayor and city council of the city of Helena that they designate the places for the erection of poles and fixtures in and upon the streets, avenues, and alleys of that city for

the proper construction and installation of a telephone system, and permit the erection of such poles and fixtures and the placing of necessary wires thereon. Compliance with this demand was refused, and these proceedings begun. An alternative writ of mandate was issued and served, and upon the return a motion to quash the alternative writ and dismiss the proceedings was interposed and sustained, the proceedings dismissed, and a judgment in favor of the defendants entered, from which judgment this appeal is prosecuted.

Section 14 of Article XV of the Constitution of this state provides: "Any association, or corporation, or the lessees, or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section." Pursuant to this provision of the Constitution, section 1000 of the Civil Code was enacted. That section reads as follows: "A telegraph or telephone corporation, or a person, is hereby authorized to construct such telegraph or telephone line or lines from point to point, along and upon any of the public roads, by the erection of necessary fixtures, including posts, piers and abutments, necessary for the wires; but the same shall not incommode the public in the use of said roads or highways."

In 1905 the legislature amended this section by enlarging its provisions so as to make them applicable to electric light and electric power lines also, and adding this proviso: "Provided, however, that the provisions of this Act shall not apply to public roads and highways within the limits of incorporated cities or towns." (Session Laws, 1905, p. 122, Chapter LV.)

The question presented for determination here is: Does the Act of 1905 violate the mandate of the Constitution contained in section 14, Article XV, above? This section of the Constitution is not self-executing. Legislation must be had to make the right granted effective. If the legislature failed or refused to enact any measure on the subject at all, then

the right granted would simply lie dormant, for it must be conceded that there is not any power which can coerce the legislature into enacting a particular law. In the absence of legislation making the grant effective, it is of no use whatever. In the absence of legislation it would be an unlawful obstruction of any public highway to place poles, posts, or other fixtures for use of a telephone or telegraph line in it. The Constitution commands the legislature to enact a law upon the subject; but, if the legislature refuses to do so, there is not any way to enforce the command. If, however, the legislature does act, the law which it enacts must be a general one of uniform operation, providing reasonable regulations which will *give full effect* to the grant contained in the section of the Constitution quoted above. Does the Act of 1905 meet these requirements?

We may concede without discussion, for the purposes of this case, that it is a general law; that it is so far of uniform operation as not to violate the uniformity clause, and that, so far as it goes, its regulations are reasonable. But does it give, or tend to give, full effect or any practical effect to the grant contained in section 14 of Article XV above? That grant was not intended merely to enable telegraph and telephone lines to be constructed and maintained for the purpose of ornamenting railroad lines or public roads in county districts, but to enable the telegraph and telephone business, as such, to be conducted in this state. The Act of 1905 provides that the public roads and highways of the state may be utilized for the erection of necessary posts, piers and abutments for the stringing of wires, provided they are so used as not to interfere with or endanger the public in their use, but that this privilege shall only extend to public roads and highways outside of incorporated cities and towns.

However, counsel for respondents contends that this Act is fully supplemented by subdivision 43 of section 4800 of the Political Code, as amended by an Act of the Fifth Legislative Assembly, approved March 8, 1897 (Session Laws, 1897, p. 203), which reads as follows: "The city or town council has

power: * * * (43) To regulate or suppress the erection of poles and the stringing of wires, rods, or cables in the streets, alleys, or within the limits of any city or town." But, at most, this provision does not enable a corporation or individual wishing to engage in the telegraph or telephone business to do so. Even assuming for the sake of argument, that the legislature could delegate to incorporated cities and towns exclusive authority to legislate upon a subject with respect to which the Constitution says the legislature itself must act, this provision only leaves it to the option of the cities and towns to legislate upon this subject, and, if they do not do so, they cannot be coerced into acting any more than the legislature itself, and if they fail to enact any ordinances upon the subject at all, as they are left free to do, then we have an Act of the legislature which doubtless assumed to give effect to section 14 of Article XV above, but which in fact only permits the telegraph and telephone business to be carried on in the country districts of the state; for, the constitutional provision not being self-executing, and the Act of 1905 not applying to incorporated cities or towns, then, if the cities and towns fail to legislate upon the subject, the right granted by the Constitution in section 14, Article XV, above, can only be made useful in the country districts of the state.

A statute which provides that a corporation or individual, seeking to erect and maintain a line of telephone and engage in the telephone business, may erect and maintain such telephone line along the public roads and highways outside of incorporated cities and towns only, and which leaves the cities and towns free to refuse to enact legislation upon the subject and thereby prevent such business being conducted within those municipalities, does not give full effect, or any practical effect, to the grant contained in section 14, Article XV, above. In the *Red Lodge Case* (*State ex rel. Telephone Co. v. Mayor*, 30 Mont. 338, 76 Pac. 758) it is said: "If the subordinate divisions of the state are vested with the authority either of preventing the construction of these lines, or of imposing restrictions which will have that effect, then the legislature has not

complied with this constitutional command." As said before, a failure on the part of a municipality to enact an ordinance upon the subject is just as effective means of prohibiting the business being conducted within the corporate limits of such municipality, as could possibly be devised.

When the constitutional provision above was adopted, it was common knowledge that practically the only use of the telephone was for commercial purposes, and that the great bulk of that business originated in, if it was not absolutely confined to, incorporated cities and towns, and, in order to secure the business and accommodate the public, the terminals for long distance lines and the local exchanges must of necessity be located in the business centers, where, as a matter of fact, they have always been located, and the grant was intended to enable a corporation or individual seeking to do so, to carry on the telephone business as it was done at the time the provision was adopted. To confine a telephone company or an individual operating a telephone line to country districts alone would defeat the very purpose of the grant. (*State ex rel. Tel. Co. v. Mayor*, 30 Mont. 338, 76 Pac. 758; *Chamberlain v. Iowa Tel. Co.*, 119 Iowa, 619, 93 N. W. 596.)

The command in section 14, Article XV, of the Constitution, above, to the legislature, is to pass a general law of uniform operation, with reasonable provisions, and which will enable the telephone business to be conducted in this state as it was generally conducted throughout the country in 1889; that is, access to the business centers—the cities and towns—must be granted, and any law which falls short of this does not comply with the constitutional provision above. Nothing said herein renders inoperative subdivision 43 of section 4800 above, as amended; for after the legislature has complied with the command of section 14, Article XV of the Constitution, by the enactment of such legislation as is there contemplated, it may then, doubtless, authorize cities and towns to make such reasonable rules and regulations for the regulation of such business as may be considered necessary. (*Red Lodge Case*, above, at page 346.)

In so far as the Act of 1905 fails to meet the requirements of section 14, Article XV of the Constitution, it is invalid. It is not necessary to consider in this case whether the whole of the Act of 1905 above is inoperative. The proviso is, and so far as this appellant is concerned, his rights are the same whether they be measured by the Act of 1905 or by section 1000 of the Civil Code. With the proviso eliminated from the Act of 1905, the conditions presented in this case are the same as in the *Red Lodge Case*, and the decision rendered therein is conclusive of this appeal.

The judgment is reversed, and the cause remanded to the district court, with directions to issue the writ of mandate as prayed for.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
CONCUR.

STATE, RESPONDENT, v. MORRISON, APPELLANT.

(No. 2,231.)

(Submitted February 27, 1906. Decided March 26, 1906.)

Criminal Law—Appeal—Record—Briefs—Instructions.

Criminal Law—Appeal—Record—Bill of Exceptions—Settlement—Notice.

1. Where it does not appear, on appeal in a criminal case, that the statutory notice (Penal Code, sec. 2171; Laws 1903, p. 47) had been given to the county attorney as to the time when the draft of the proposed bill of exceptions would be presented to the district judge for settlement, or that the state had waived such notice, the bill will not be considered by the appellate court.

Criminal Law—Record—Questions Reviewable—Admissibility of Evidence.

2. Where, on appeal in a criminal case, the evidence is not in the record, alleged errors in respect to the admission of evidence will not be considered.

Criminal Law—Appeal—Briefs—Instructions.

3. Where the brief of appellant in a criminal case fails to comply with Rule X, subsection 3b, providing that, where error is alleged in the charge of the court, the instructions given or refused shall be set out in the specifications *in totidem verbis*, errors so assigned will not be considered.

34	75
34	428
34	586

Criminal Law—Record—Manner of Bringing up on Appeal.

4. The "record of the action" in a criminal case, as defined in Penal Code, section 2229, cannot be brought up on appeal in the body of a bill of exceptions.

Civil Actions—Appeal—Records—Judgment-roll—Bill of Exceptions.

5. *Obiter*: The judgment-roll in a civil case may not be brought to the supreme court on appeal in the body of a bill of exceptions.

Criminal Law—Review—Invited Error—Instructions.

6. Errors in instructions given at the request of the defendant in a criminal case may not be complained of by him on appeal.

Appeal from District Court, Silver Bow County; Michael Donlon, Judge.

ELIZABETH MORRISON was convicted of the crime of manslaughter. She appeals from the judgment of conviction and from an order denying her a new trial. Affirmed.

Mr. A. J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

Under the Act of February 23, 1903, Laws of 1903, page 47, "the only method of preserving for review by the supreme court on appeal, any proceedings, evidence or matter not designated by the Penal Code as part of the record on appeal without bill of exceptions shall be by bill of exceptions prepared and settled under either section 2171 of the Penal Code or this Act, as one or the other may be appropriate." The record in this case consists wholly of that which is denominated "statement on motion for a new trial," but under this law, the proper designation is a "bill of exceptions."

The record or judgment-roll on an appeal by the defendant in a criminal action, as provided for in section 2229 of the Penal Code, answers and serves the purpose of a judgment-roll, as provided for in civil actions. Instructions given or refused properly constitute a part of the judgment-roll, and none of the papers which by the provisions of said section 2229 constitute a part of the record have any place whatsoever in a bill of exceptions, or what is the same thing, a statement on motion for a new trial. Such papers can only be brought to the attention of the court in the manner provided by law—that is,

they must appear in the judgment-roll. But here there is no judgment-roll, only a bill of exceptions. The certificate of the clerk to the effect that the foregoing is a true and correct copy of the judgment-roll does not have the effect of making the papers which precede it a judgment-roll in this case, for those papers, as well as this certificate, are incorporated in the bill of exceptions. There being no judgment-roll or record here, the court cannot consider the assignment of errors as to the instructions or any papers which belong only in the judgment-roll. (*Featherman v. Granite Co.*, 28 Mont. 462, 72 Pac. 972; *Butte M. & M. Co. v. Kenyon*, 30 Mont. 314; 76 Pac. 696, 77 Pac. 319; *Glavin v. Lane*, 29 Mont. 228, 74 Pac. 406; *Shropshire v. Sidebottom*, 30 Mont. 406, 76 Pac. 941; *State v. Mason*, 18 Mont. 362, 45 Pac. 557, and cases cited.)

The "notice of at least two days," mentioned in section 2171 of the Penal Code, refers to the presentation of the bill of exceptions to the judge for settlement, and not to the service of the copy of the bill; and these provisions of the section "are mandatory, and where the record on appeal does not show affirmatively that such notice was given the bill of exceptions will not be considered." (*State v. Stickney*, 29 Mont. 523, 75 Pac. 201; *State v. Moffatt*, 20 Mont. 371, 51 Pac. 823; *State v. Gawith*, 19 Mont. 48, 47 Pac. 207.)

The record in the case at bar does not contain any evidence whatsoever that any notice was given to the opposing counsel of the presentation of his bill of exceptions (statement on motion for a new trial) to the judge for settlement, though it does appear that a copy of the bill had been served upon the county attorney several days prior to the date when the judge settled the bill.

By reason of these errors, the court cannot consider any matters contained in this bill of exceptions or statement on motion for a new trial, and if the bill of exceptions is disregarded, there is no record before the court whatsoever.

Mr. J. Bruce Kremer, and Mr. Edwin S. Booth, for Appellant.

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal by the defendant from a judgment of conviction of the crime of manslaughter and from an order denying defendant's motion for a new trial.

1. Appellant has attempted to set out in her brief thirty specifications of error. The bill of exceptions used in this case, which is called "a statement on motion for a new trial," being that which was used on motion for new trial, cannot be by us considered. The point is raised by the respondent and is well taken, to-wit: That it does not appear that any notice was given to the county attorney as to the time when the draft of the bill would be presented to the judge for settlement, and it does not appear that the state in any way waived notice. (*State v. Kremer, ante*, p. 6, 85 Pac. 736.)

2. Specifications of error 1 to 17, inclusive, as set out in appellant's brief, refer to alleged errors of the court in respect of the evidence and the introduction thereof. The evidence not being before us, having been stricken out as aforesaid, these specifications cannot be considered. The remaining specifications, 18 to 30, inclusive, pertain to the giving and refusing of instructions. As to them it is sufficient to say that the brief of appellant fails to comply with Rule X, subsection 3b (30 Mont. xxxviii, 82 Pac. x), requiring that instructions shall be set out in the specifications *in totidem verbis*; and for this reason, as heretofore so frequently said by this court, defendant has not the right to have these specifications considered.

3. There is not any record of the action before this court in the transcript. The transcript on page 1 commences with "Statement on Motion for a New Trial," and contains, with the evidence and other things, what is certified in the body of the statement to be the "judgment-roll." What is called the statement is, as we have seen in the first paragraph of this opinion, stricken out. Therefore there is not anything before the court in the form of a record or transcript. Neither the

"record of the action" in a criminal case (as defined in section 2229, Penal Code), nor the judgment-roll in a civil case, can be brought up in the body of a bill of exceptions.

4. Notwithstanding the condition of the transcript, as before set forth, we have examined into the matter of the alleged specifications of error, so far as we have been able to do it, from 18 to 30, inclusive, on the appeal from the judgment, assuming that "the record of the action," if it were before us, would be identical with the "judgment-roll" as contained in the bill of exceptions, and find that several of the instructions given and complained of were given at the request of the defendant, and therefore, however erroneous or prejudicial they may be, she may not object to them. We find, further, as to the rest of the instructions given and refused and cited as error, that the court did not commit any error prejudicial to the defendant.

The judgment and the order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

YEGEN, APPELLANT, v. BOARD OF COUNTY COMMISSIONERS OF YELLOWSTONE COUNTY ET AL., RESPONDENTS.

(No. 2,274.)

(Submitted March 2, 1906. Decided March 26, 1906.)

*County Commissioners—Powers—Statutes—Constitution—
County Boards of Health.*

County Commissioners—Powers—Erection of Detention Hospital.

1. A statute which empowers the board of county commissioners to erect a detention hospital, but fails to authorize it in express terms to acquire a site for such building, impliedly grants such power, since every power necessary for the execution of a power expressly granted is implied.

34	79
36	143
34	79
37	14

Constitution—Statutes—Title—State and County Boards of Health.

2. Sections 11, 25 and 26 of House Bill No. 104 (Laws 1901, p. 80), the purpose of which Act, as expressed in the title, was to form a state board of health, define its powers and duties and provide for the compensation of its officers and for the enforcement of its rules, while the body of the statute, among other things, confers upon county boards of health power to declare quarantine against contagious diseases and confine persons affected with such diseases in suitable detention hospitals, power for the erection of which is also granted, are unconstitutional as in contravention of Article V, section 23, of the Constitution, which declares that no bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in its title.

Statutory Construction—Legislature—Review.

3. In construing legislation the supreme court will not inquire whether it is good or bad, moral or immoral in its tendencies, the legislature being the exclusive judge, within the limitations of the Constitution, as to the advisability of enacting a particular bill into law, and its judgment and discretion in the performance of its duties may not be reviewed by the courts.

Statutory Construction—Implied Repeal.

4. Where a former Act upon a certain subject is not referred to in a subsequent statute, although the provisions of the first are substantially embodied in the later one, it will be held that it was not the purpose of the legislature to repeal it or set it aside.

County Commissioners—Powers—Detention Hospitals—Statutes.

5. Under Political Code, section 4230, the board of county commissioners has not the power to erect and maintain a detention hospital, for persons affected with contagious or pestilential diseases, at the expense of the county, subsection 7 thereof, which confers authority to provide "necessary county buildings," referring simply to such buildings as may be required for ordinary county purposes, and subsection 9, under which a hospital may be constructed, having reference to a hospital for the indigent sick.

County Boards of Health—Powers—Real Estate—Purchase.

6. The power given to the county board of health, consisting of the county commissioners and one physician, under Political Code, section 2864, to pay out of the general fund of the county the necessary expenses attendant upon the enforcement of the chapter relating to such boards of health, does not include authority to the board of county commissioners to acquire land on their own motion and to erect buildings thereon.

County Commissioners—County Boards of Health—Status.

7. The board of county commissioners and the county board of health, consisting of the commissioners and one physician (Political Code, sec. 2860), are two bodies with distinct and separate powers.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by Christian Yegen against the board of county commissioners of Yellowstone county and others. From an order refusing a temporary injunction, plaintiff appeals. Reversed.

Mr. Fred H. Hathhorn, and Mr. Harry A. Groves, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from an order refusing to issue an injunction. It appears from the complaint on file herein that the board of county commissioners of Yellowstone county, having concluded to establish a county detention hospital, opened negotiations with the Minnesota-Montana Land and Improvement Company, a corporation, to purchase from it a certain block in the city of Billings on which to erect a suitable hospital building. The negotiations had progressed so far that upon proper application the district judge of the district of which that county is a part had appointed appraisers to fix the price, and this had been done. Thereupon the plaintiff brought this action as a taxpayer to enjoin the board from proceeding further in the matter, on the ground that the board has no power to purchase property for such a purpose or to establish such a hospital. An order to show cause was issued, fixing the hearing for November 18, 1905, at chambers, at Miles City. The defendant board showed cause by demurrer, on the ground that the complaint does not state a cause of action, and moved the judge to deny the injunction. After argument, this motion was sustained. Thereupon the plaintiff appealed.

The sole question presented is, whether the board has power, under the Act of 1901 (Laws of 1901, p. 80), to purchase a site and erect a detention hospital at the expense of the county, or, in case that statute is invalid, whether the statute defining the general powers of boards of county commissioners confers the power. The Act referred to is entitled, "An Act creating a state board of health, defining its powers and duties and providing for the compensation of its officers, and providing for

the enforcement of the rules and regulations of said board.” Section 1 creates the state board of health. Sections 2, 3, 4, 5, 6, and 8 define its powers and duties and fix the compensation of its secretary. Section 7 provides for the compensation and expenses of its members. Sections 2, 3, 4, and 8 also provide for the organization and meetings of the board, the organization of local boards in the cities and villages of the state, the adoption of rules and regulations and the means of enforcing them, the payment of expenses in the emergencies of existing or threatened epidemic or pestilential diseases in particular localities, and for public conferences of local health officers appointed by the board. Sections 9 to 35 create county boards of health consisting of the members of the boards of commissioners of the respective counties and one physician selected by them, define their powers and duties, provide for local health officers, define their powers and duties, and deal with certain miscellaneous matters concerning the public health in general. Sections 11, 25, and 26 are as follows:

“Section 11. The board of health of any county may declare quarantine therein, or in any part thereof, against contagious or infectious diseases prevailing in any other place, and against all persons and things likely to spread contagion or infection. The board has power and authority to enforce such quarantine until the same is raised by it, and may confine any person affected with or likely to spread contagious or infectious diseases in a suitable detention hospital prepared and used for that purpose, or if no such place is prepared by the county, then such persons shall be quarantined in his or her home or abode.”

“Section 25. The municipal or county authorities may provide for the use of the city, town or county, hospitals or temporary places for the reception of the sick; and for that purpose may themselves build such hospitals or places of reception, or enter into an agreement with any person having the management of any hospital for the reception of the sick inhabitants of their city, town or county, on payment of such

sums as may be agreed upon; or two or more local authorities may combine in providing a common hospital.

"Section 26. Any expenses incurred by the authorities of any city, town or county in maintaining a hospital or a temporary place for the reception of a patient shall be paid from the general fund of the city or county."

While these sections do not in express terms empower the boards of commissioners to acquire sites for the erection of detention hospitals for their respective counties, they do confer the power to build them, and, by the well-settled rule that every power necessary to execute the power expressly granted is necessarily implied, the power to acquire by purchase or otherwise suitable sites for these hospitals is necessarily implied; for it would be idle to say that the boards have power to erect suitable buildings for the expressed purpose, and then say that they have no power to proceed because there is no express grant of power to purchase suitable sites for them. So that whether any power in the premises has been effectively granted depends upon an answer to the further inquiry, whether the legislation is invalid because it was not enacted in conformity with section 23, Article V, of the Constitution, as appellant contends. This section declares: "No bill except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject shall be embraced in any Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed."

The particular criticism of the Act is that the title of it does not express the subject of the legislation. The reasons for the enactment of this constitutional provision are stated by this court in *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100, and in *State v. Anaconda Copper Min. Co.*, 23 Mont. 498, 59 Pac. 854. In the latter case they are summarized as follows: "To restrict the legislature to the enactment of laws the objects of which legislators and the public as well may be advised of, to the end that any who are interested, whether as representatives or those

represented, may be intelligently watchful of the course of the pending bill. The limitation is likewise designed to prevent legislators and the people from being misled by false or deceptive titles, and to guard against fraud in legislation by way of incorporating into a law provisions concerning which neither legislators nor the public have had any intimation through the title read or published." This summary is in substance the same as that laid down by Judge Cooley in his work on Constitutional Limitations (seventh edition), page 205, and by Sutherland in his work on Statutory Construction (section 78).

It is said in *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095: "The title is generally sufficient if the body of the Act treats only, directly or indirectly, of the subjects mentioned in the title, and of other subjects germane thereto, or of matters in furtherance of or necessary to accomplish the general objects of the bill, as mentioned in the title. The title need not contain a complete list of all matters covered by the Act."

It was also said in *State v. Anaconda Copper Min. Co.*: "But by this constitutional notice it is only intended that the subject of the bill shall be fairly expressed in the title. It is not necessary—for the Constitution has not so declared—that a title shall embody the exact limitations or qualifications contained in the bill itself which are germane to the purpose of the legislature, if the general subject of the measure is clearly expressed in the title. Upon the highest authority it is held that under constitutional provisions substantially like that referred to in Montana, where the degree of particularity necessary to be expressed in the title of a bill is not indicated by the Constitution itself, the courts ought not to 'embarrass legislation by technical interpretations based upon mere form of phraseology. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title.' "

So long as the particular legislation in question is not repugnant to some provision of the fundamental law of the state,

this court may not proceed to inquire and determine whether it is good or bad, or moral or immoral in its tendencies. It may be vicious in its tendencies, yet this fact of itself is of no moment. Within the limitations of the Constitution the legislature is the exclusive judge as to whether a particular bill should be enacted into law, and its judgment and discretion in the performance of its duties may not be reviewed by the courts. It is, then, the imperative duty of the courts to sustain its action in all cases except when it is clearly repugnant to the fundamental law.

What is the underlying object of this legislation? As indicated by its title, it is not an Act dealing generally with the whole subject of the public health, but one that deals only with the establishment of the state board of health and subjects germane thereto. And it must not be overlooked that at the time of its passage there had already been created by law county boards of health, with a clear definition of their powers and duties (Political Code, secs. 2860-2864); and inasmuch as this legislation is not referred to in the Act, though its provisions are substantially embodied therein, we are justified in concluding that it was not the purpose of the legislature to repeal it or set it aside. If the Act had been entitled "An Act to Protect the Public Health," then it might have included local and county boards as subsidiary instrumentalities to accomplish the general purpose so declared (*State v. McKinney, supra*); but, in view of the law as it already existed and the purpose of the Act as indicated by its title, the object sought was restricted to the formation of a state board and a definition of its powers.

It seems that no one would conclude from a reading of its title that the Act had concealed in its bosom a provision creating county boards of health and others touching the duties of county officers, and the enlargement of the powers given them for the conduct of the ordinary affairs of the county. No one would have understood, for instance, that one purpose was to give more extensive powers to boards of county commissioners to expend the funds of the county to acquire property for pur-

poses for which they could not theretofore acquire it, and that the burdens of the taxpayers would be in consequence thereof increased. Indeed, the sections of the Political Code cited are copied substantially into the Act; but the county boards of health already created by this independent and already existing legislation are nowhere by appropriate language made subordinate means or instrumentalities to accomplish the purposes of the state board. They are continued as independent local bodies with well-defined powers, which they may exercise under such rules and regulations as they may adopt, even though inconsistent with those of the state board, and they owe no duty to the state board except that their respective secretaries must report to it certain information at stated times, but for a neglect of which there seems to be no penalty provided.

But, besides this anomalous condition, there are in the Act sections 25 and 26, quoted, which not only enlarge somewhat the powers of county boards of health to incur expense, but also add to those of the boards of commissioners of the respective counties the power to expend money for purposes for which, as we shall see, there is no warrant of law under the general powers conferred upon that body under section 4230 of the Political Code. If the legislature had enacted a portion of the Act, viz., sections 9, 10, 11, 12, 13, 25, and 26, under the title "An Act to create Boards of Health for the respective Counties in the State, and define their Powers," it would have had a law complete in itself and not open perhaps to any constitutional objection. This feature of the Act makes it clearly open to the objection urged against it, and the result is that section 25 must be declared invalid. In so far as this section of the Act is concerned, it is not effective to give the defendant board of commissioners the power under which it was proceeding. Nor, for the same reason, are either of the others.

Nor do we think that under their general powers, as defined in section 4230 of the Political Code, *supra*, the boards of commissioners have power to build and maintain detention hospitals for contagious or pestilential diseases at the expense of their counties. It is therein declared (subdivision 5) that these

boards have power to provide for the care and maintenance of indigent sick and otherwise dependent poor, and that they may erect and maintain hospitals for that purpose. However desirable it may be that they should have the power to provide separate hospitals for able-bodied and not dependent persons suffering from contagious or pestilential diseases, they are not here empowered to erect and maintain them at the expense of the taxpayer. So they may, under subdivision 6, acquire farms for the support of the dependent poor—not others. So, again, they have the power to provide necessary county buildings under subdivision 7. But what are necessary county buildings? Manifestly such as are required for ordinary county purposes, as is indicated in these and similar provisions, as, for instance, in subdivision 9. Under this latter provision they may cause to be erected a courthouse, jail, hospital and such other buildings as may be necessary. The word “hospital” evidently does not mean one or more hospitals for all classes of persons; but for that class of persons for whom the board may provide at the expense of the people, namely, the indigent sick. The phrase “such other public buildings as may be necessary” has no wider meaning, nor does it enlarge the class of purposes for which these boards may erect and maintain buildings so as to include others not of the class already mentioned.

The extent of the powers of boards of county commissioners in the state of Montana, to care for the dependent poor, whether sick or well, under provisions of statutes similar to those referred to, are discussed in *Lebcher v. County Commissioners of Custer County*, 9 Mont. 315, 23 Pac. 713, and we think the conclusion of the court there stated the correct one. That decision is conclusive of this branch of the case.

If, under the law as it stood at the time of the passage of the Act in question, the necessity arose for a place for temporary detention of persons suffering from contagious and infectious diseases, the county boards of health had power to make provision therefor at the expense of their respective counties (Political Code, sec. 2864); but the power thus given to these boards is not a power given to the boards of county commissioners to ac-

quire land on their own motion and to erect permanent buildings thereon. It must not be overlooked that the two boards, though closely associated, have distinct and separate powers, and the two must not be confounded, as the attorney general seems to have done in his argument in support of the order of the district court refusing to issue the injunction; for he insisted that the power conferred upon boards of health under section 2864 of the Political Code is an authority conferred upon the boards of county commissioners as such, by which they might purchase sites and erect detention hospitals.

The result is that the order of the district court is erroneous, and must be reversed.

Reversed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

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GLASS ET AL., APPELLANTS, v. BASIN & BAY STATE MINING COMPANY, RESPONDENT.

(No. 2,233.)

(Submitted March 2, 1906. Decided April 3, 1906.)

Judgments of Dismissal—Effect—Res Adjudicata—Presumptions—Statutes of Limitations.

Judgment on Pleadings—Dismissal—Effect—New Action—Presumptions.

1. Where the district court entered judgment on the pleadings in favor of defendant in a suit for money had and received, upon the presumption that a judgment of dismissal in a former suit on the same cause of action had been rendered on the merits and that, therefore, the second action was barred, the judgment-roll in the first action not being before the court at the time, it erred in that, under section 1007 of the Code of Civil Procedure, a judgment of dismissal is not a bar to a new action unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment-roll.

Judgment of Dismissal—Affirmance—New Action—Limitations.

2. Where, in a suit for money had and received, a judgment of dismissal on the pleadings had been affirmed on appeal, it was terminated

by such affirmance in a manner other than those mentioned in section 547 of the Code of Civil Procedure, and a second suit on the same cause of action, brought within a year after such termination, was not barred.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by James Glass and another against the Basin & Bay State Mining Company. Judgment for defendant. Plaintiffs appeal. Reversed.

Messrs. Bach & Wight, for Respondent.

It appears from the copy of the judgment set up in the answer, and which is necessarily a part of the judgment-roll, and which is admitted by the replication, that said judgment was rendered upon the pleadings. We therefore contend that under the provisions of our statute it appears from said judgment that it was rendered upon the merits. Section 1004 of the Code of Civil Procedure provides the cases in which a dismissal not upon the merits may be had, and a judgment upon the pleadings is not included therein. Section 1005 provides that in all other cases judgment must be rendered on the merits. Therefore, a judgment on the pleadings not being included in section 1004, the same must come under the provisions of section 1005, and is a judgment on the merits. (*United States v. Parker*, 120 U. S. 96, 7 Sup. Ct. 454, 30 L. Ed. 601; *Jacobs v. Marks*, 182 U. S. 594, 21 Sup. Ct. 865, 45 L. Ed. 1247; *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291; 2 Abbott's Trial Brief, 2d ed., p. 1219; *People v. Skidmore*, 27 Cal. 294.)

It is true that a motion for judgment on the pleadings is similar in some respects to a demurrer, with this exception, however, a demurrer may raise questions of mere formal defects, which do not touch the merits of the action, such as misjoinder of parties, causes and the like, whereas a judgment on the pleadings goes to the merits—in fact, a judgment on the pleadings is a judgment to the effect that there are no merits in the cause of action, or defense. Therefore, if a motion for

judgment on the pleadings is to be likened unto a demurrer at all, it must be to a demurrer which goes to the merits of the cause of action or defense. And a demurrer which goes to the merits of the cause of action is as complete a bar to a subsequent action as any other judgment. (*Kleinschmidt v. Binzel*, 14 Mont. 52, 43 Am. St. Rep. 604, 35 Pac. 460; Am. & Eng. Ency. of Law, 795, 798. See, also, *Gould v. Evansville R. R. Co.*, 91 U. S. 532, 23 L. Ed. 418; *Bissell v. Spring Valley Township*, 124 U. S. 232, 8 Sup. Ct. 495, 31 L. Ed. 414; *Aetna Life Ins. Co. v. Commissioners*, 117 Fed. 87, 54 C. C. A. 468; *Peant v. Carpenter*, 19 Wash. 621, 53 Pac. 1108; *Hardy v. Hardy*, 97 Cal. 125, 31 Pac. 907; *Lamb v. McConkey*, 76 Iowa, 47, 40 N. W. 78; *Carlin v. Brackett*, 38 Minn. 307, 37 N. W. 342; *Porter v. Fraleigh*, 19 Ind. App. 562, 49 N. E. 863; *City of Los Angeles v. Mellus*, 58 Cal. 19; *Robinson v. Howard*, 5 Cal. 428; *Alley v. Nott*, 111 U. S. 475, 4 Sup. Ct. 495, 28 L. Ed. 492; *Messinger v. New England Mut. Life Ins. Co.*, 59 Fed. 416; *Lindsley v. Union S. S. M. Co.*, 106 Fed. 470; 2 Black on Judgments, 2d ed., 709.)

It would hardly be contended that a judgment rendered upon an agreed statement of facts would not constitute *res judicata*. A judgment on the pleadings certainly amounts to nothing more or less. It is only proper where there is no material fact in issue, and a trial by jury therefore unnecessary.

Mr. M. S. Gunn, and *Mr. Edward Horsky*, for Appellants.

The judgment pleaded does not expressly or otherwise declare that the same was rendered upon the merits, and the judgment-roll is not made a part of the answer and was not before the court. If, therefore, the lower court sustained the motion for judgment on the pleadings in this case because of the plea of former adjudication, error was committed in so doing.

In the court below the defendant called attention to section 1005 of the Code of Civil Procedure, and it was contended that the judgment in the former case was necessarily a judgment on the merits because a judgment upon the pleadings is not such

a judgment as is mentioned in section 1004 of the Code of Civil Procedure. Section 1005 is identical with section 582 of the Code of Civil Procedure of California, which went into effect January 1, 1873. Section 1004 is the same as section 581 of the Code of Civil Procedure of California. In California it has been uniformly held that a judgment which does not determine the merits of the action, even though such judgment is not within the provisions of section 581 of the Code of Civil Procedure of that state, will not operate as a bar to another action between the same parties for the same cause of action. (*Gray v. Dougherty*, 25 Cal. 266; *Terry v. Hammonds*, 47 Cal. 32; *Ferrea v. Chabot*, 63 Cal. 564; *City of Los Angeles v. Mellus*, 59 Cal. 444; *Rosenthal v. Mann*, 93 Cal. 505, 29 Pac. 121.)

Is a judgment based upon the ground that a complaint does not state a cause of action a bar to a future action between the same parties upon the same cause of action, in which the objections to the pleadings in the former case have been obviated? This question was answered by this court in the opinion in the case of *Kleinschmidt v. Binzel*, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 40. (See, also, *Gilman v. Rives*, 10 Pet. 301, 9 L. Ed. 433; *Freeman on Judgments*, sec. 267; *City of Los Angeles v. Mellus*, 59 Cal. 452; *Gerish v. Pratt*, 6 Minn. 61; *Moore v. Dunn*, 41 Ohio St. 62; *Wells v. Moore*, 49 Mo. 229; *Gould v. Evansville etc. Co.*, 91 U. S. 526, 23 L. Ed. 416; *Herman on Estoppel*, sec. 274; *City of Aurora v. West*, 7 Wall. 82, 19 L. Ed. 42; *Pepper v. Donnelly*, 87 Ky. 259, 8 S. W. 441.)

The plea of a former adjudication in bar cannot be supported by any presumption, but it devolves upon the party interposing the plea to establish the facts sustaining the plea. In the case at bar it cannot be presumed that the allegations of the complaint in the first case are the same, or substantially the same, as the allegations of the complaint in the case before the court, and as the complaint in the former case was not before the lower court, there was no basis for holding the judgment in the former case a bar.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for money had and received. The complaint is in the ordinary form, alleging that the defendant, a corporation organized under the laws of Montana, is indebted to the plaintiffs in the sum of \$140,000 for money had and received for the use and benefit of plaintiffs. Judgment is demanded for that amount and costs.

The answer presents six separate defenses. The first is a denial of all allegations contained in the complaint. The second, third, fourth and fifth allege, respectively, that the cause of action is barred by the provisions of subdivision 1 of section 514 of the Code of Civil Procedure, subdivision 1 of section 513 as amended by Session Laws of 1903, page 292, subdivision 3 of section 514 as amended by the same Act, and by section 512 of the same Code. The sixth defense alleges, in substance, that heretofore, on August 21, 1901, in an action then pending in the district court of the fifth judicial district of the state of Montana, in and for the county of Jefferson, between the plaintiffs herein as plaintiffs and the defendant herein as defendant, being the same parties as are parties to this cause, and for the same cause of action, there was interposed by defendant a motion for judgment on the pleadings, which, upon consideration by the court, was sustained and a final judgment rendered and entered for defendant dismissing the action.

The amended replication denies that the cause of action is barred by any of the provisions relied upon by the defendant in the second, third and fifth defenses, or otherwise, or at all, and alleges by way of avoidance of the sixth defense that in the month of February, 1900, the plaintiffs began an action against the defendant in the district court of the fifth judicial district upon the same cause of action as stated in the complaint herein; that judgment was rendered and entered therein in favor of the defendant as alleged; that the plaintiffs thereupon appealed to the supreme court; that such proceedings were had in the cause in the supreme court that the judgment was on June 27, 1904,

affirmed on the ground that the complaint therein did not state a cause of action, but that said judgment was not a judgment upon the merits.

It is further alleged by way of avoidance of the defense of the statutes of limitation that since the accrual of the cause of action stated in the complaint each and all of the officers and agents of the defendant upon whom service of process could be had, had been absent from the state, except for a period of about two years and eight months prior to the commencement of this action.

Upon these pleadings the defendant moved for judgment, on the ground that no issue of fact is presented upon the fourth defense pleaded in the answer, for that the same is not denied in the amended replication, and for the reason that the avoidance thereof pleaded in said replication is contrary to the laws of the state of Montana, and for the further reason that there is no issue of fact to be tried on the sixth defense pleaded in the answer, the same being admitted in the amended replication, and the avoidance thereof pleaded in the replication is contrary to the laws of the state of Montana. This motion was, after argument, granted and judgment entered for the defendant. The appeal is from the judgment.

The judgment referred to in the pleadings was affirmed in 31 Mont. 21, 77 Pac. 302, under the title of *Glass et al. v. Basin & Bay State Min. Co.* In this case two questions are submitted for decision: (1) Whether the right to maintain this action is barred by the judgment in the former action; and (2) whether upon the face of the proceedings it is apparent that the cause of action is barred by any of the limitations pleaded. It is contended by appellants that upon the face of the pleadings both of these questions should have been answered in the negative and that the motion for judgment should have been denied.

1. Does it appear that the former judgment was upon the merits of the controversy? Section 1007 of the Code of Civil Procedure declares that "a final judgment dismissing the complaint, either before or after a trial, does not prevent a new

action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon its merits." The appellants' position is that the judgment pleaded does not expressly declare that it was rendered on the merits; and, since the judgment-roll was not before the district court, it could not tell on the trial of the motion what its effect was. The argument of respondent is that section 1004 of the Code of Civil Procedure enumerates the cases in which an action may be dismissed or judgment of nonsuit entered; that section 1005 declares that in all other cases than those mentioned in section 1004 the judgment must be rendered on the merits; and that, since the judgment in controversy does not fall within the cases enumerated in section 1004, the presumption must be indulged that it was rendered on the merits. Hence it is said that the judgment of the district court, since it is aided by this presumption, must be deemed correct. In this contention we think respondent is in error.

The rule contended for by respondent is recognized by the supreme court of the United States in *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601. In that case the court had under consideration the statutes of Nevada, which are nearly identical with sections 1004 and 1005, *supra*; but that decision has no application to this case, for the reason that the Code of Nevada contains no such provision as section 1007. Furthermore, this court in *Kleinschmidt v. Binzel*, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 460, held under an identical statute (Compiled Statutes, 1887, Div. 1, sec. 243) that a judgment rendered on demurrer did not estop the plaintiff in the action from asserting his claim in a subsequent action, nothing appearing upon the face of the pleadings to show that the judgment went to the merits, rather than to some defect of form. A judgment on the pleadings is the same as a judgment on demurrer. (*Power et al. v. Gum*, 6 Mont. 5, 9 Pac. 575.)

Judgments on demurrer or on the pleadings which result in the dismissal of the action are not enumerated in section 1004. As will be seen by an examination of the case of *Kleinschmidt v. Binzel*, *supra*, and the authorities cited, it was a matter of dis-

pute when that decision was made, as to what presumption should attach to them when pleaded in bar. That case declared the rule which controlled in this state until the adoption of the Code in 1895, which, besides bringing forward in sections 1004 and 1005 the provisions of the Compiled Statutes, *supra*, added section 1007. This provision, construed with the others, means nothing more nor less than that judgments of dismissal, whether included in the enumeration in 1004 or not, shall not be a bar to another action upon the same cause of action, unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment-roll. In other words, such a judgment must show of itself, or by aid of the judgment-roll, that it concludes the merits of the controversy, or it is no defense. The judgment relied on here shows upon its face that it belongs to the class referred to in section 1007. It does not declare that it adjudicates the merits, and, since the judgment-roll was not before the district court, no presumption can be indulged that it was rendered on the merits. In so far, therefore, as the action of the district court was based upon such presumption, it was erroneous.

2. This being so, the question whether this action is barred by the provisions of any of the statutes pleaded depends for its answer upon the further inquiry whether section 547 of the Code of Civil Procedure applies to the circumstances of this case. That section reads: "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

There is no question that the first action was begun within the time limited therefor. The judgment of dismissal was affirmed by this court. The action was, therefore, not voluntarily

discontinued, nor was it dismissed for want of prosecution, nor, so far as the record before us shows, was the judgment rendered upon the merits. It was terminated by the judgment of affirmance in a manner other than those which do not toll the statute. It was commenced within one year from the termination of the former action. It therefore falls within the provisions of the statute, and none of the limitations pleaded apply so far as the pleadings show. If on the trial, and upon inspection of the judgment-roll in the former action, it is manifest that the former judgment was upon the merits, this will be conclusive of the case, and the inquiry as to whether the limitations apply will become immaterial.

The view we have thus taken of the case renders it unnecessary to consider whether the absence from the state of all of the agents of a domestic corporation upon whom process may be served tolls the statute of limitations during the time of such absence.

The judgment of the district court was erroneous, and must be reversed.

Reversed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

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41	366

STATE EX REL. RUEF, RELATOR, v. DISTRICT COURT OF
THE TWELFTH JUDICIAL DISTRICT ET AL., RE-
RESPONDENTS.

(No. 2,283.)

(Submitted March 8, 1906. Decided April 3, 1906.)

Wills—Foreign Wills—Probate—Contests—Prohibition.

Foreign Wills—Probate—Contests—Prohibition.

1. A will executed in another state in accordance with its laws, by a testator residing there and having both real and personal property in this state at the time of his death, and subsequently duly admitted to probate there and afterward to ancillary probate in the county in this state in which the property of the testator was situated,

may not be contested in the courts in this state upon the grounds that the testator at the time of making it was not of sound and disposing mind, or was acting under duress, fraud or undue influence; and prohibition lies to restrain the district court from proceeding to hear such contest.

Foreign Wills—Probate.

2. While the Code of Civil Procedure does not in express terms provide for the probate of a will executed in another state, it does so impliedly by section 2351, which makes provision for a hearing of such application and notice thereof.

Foreign Wills—Probate—Contest—Grounds.

3. The grounds upon which the probate of a foreign will may be contested, while not expressly designated in the Code of Civil Procedure, are impliedly set forth in section 2352 by the questions with reference to which the trial court must make findings before admitting it to probate.

Probate Proceedings—Judgment.

4. A judgment in probate proceedings is a judgment *in rem*.

Wills—Decree Admitting to Probate—Effect.

5. A decree of a court admitting a will to probate establishes such instrument as a will, and while the decree may be subject to attack in a proper proceeding and open to review on appeal, yet, until set aside, such decree is conclusive of all facts necessary to the validity of the will.

Foreign Wills—Probate—Requisites.

6. In order to allow a will executed in another state to probate in this state, it must first appear that it was duly proved, allowed and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made, or in which the testator was at the time domiciled or in conformity to the laws of this state, and that the record is authenticated as required by section 905 of the United States Revised Statutes.

ORIGINAL application by the state, on the relation of A. Ruef, as executor of G. F. Deletraz, for a writ of prohibition restraining the district court of the twelfth judicial district and the Honorable Jere B. Leslie, presiding in place of the resident judge who was disqualified, from hearing the contest of a will. Peremptory writ ordered issued.

Mr. F. E. Stranahan, for Relator.

Mr. George H. Stanton, and *Mr. J. A. McDonough*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prior to his death, which occurred at San Francisco, on March 7, 1904, G. F. Deletraz made and published two wills,

the first of which for convenience will be designated the "Mossholder will," and the last the "Ruef will." Such proceedings were had in the superior court of San Francisco that the Ruef will was duly admitted to probate, and letters testamentary issued to the person named as executor in that will. The decedent had real and personal property in Chouteau county, Montana, and in May, 1904, after the will had been admitted to probate in California, a copy of such will and the probate thereof, duly authenticated, were produced by the executor with a petition for letters, and filed in the district court of Chouteau county, where such proceedings were had that thereafter, on December 30, 1904, it appearing to that court from the record that said will had been proved, allowed and admitted to probate in the state of California, and that it was executed according to the laws of California, a decree was duly given and made admitting such will to probate.

Thereafter, on February 2, 1905, certain devisees, and the executor named in the Mossholder will, filed in the district court of Chouteau county what purported to be a contest in writing of the Ruef will, which writing sets forth as the ground of contest that, at the time of making the Ruef will, the testator, Deletraz, did not have mental capacity to make a will and was acting under fraud, misrepresentation, and undue influence of certain other persons, and prays that the order admitting the Ruef will to probate be annulled; that the letters issued thereon be revoked; that the Mossholder will be admitted to probate; and that letters testamentary issue to the executor named in that will. To this contest the relator, the executor named in the Ruef will, demurred on the ground that the district court of Chouteau county has not jurisdiction to hear such contest, and that the so-called contest in writing does not state facts sufficient to constitute any ground of contest. This demurrer was overruled, and, the district court being about to proceed to hear such alleged contest, an application was made to this court for a writ of prohibition restraining the district court of Chouteau county and the Honorable Jere B. Leslie, judge of said court for the purpose of hearing all the proceedings in connection

with this matter, the resident judge being disqualified, from further proceeding with said alleged contest. An alternative writ was issued, and upon the return the matter was submitted upon a motion to quash the alternative writ and dismiss the proceedings.

The question which arises, and which was submitted for determination, is: May a foreign will, after it has been admitted to probate in this state, be contested in the courts of this state upon the ground that the testator at the time of making such will was not of sound and disposing mind, or was acting under duress, fraud or undue influence?

A "foreign will," in the sense that the term is used throughout this opinion, is a will executed in another state by a testator residing there, admitted to probate in such sister state after the death of the testator, and subsequently offered for ancillary probate in this state, as was the case with the will now under consideration.

While our Code does not in express terms provide for the contest of an application to the courts of this state for the probate of a foreign will, it does so impliedly; for section 2351 of the Code of Civil Procedure, which has to do with the subject, provides for a hearing of such application, and that notice of such hearing shall be given. If objections could not be made at such hearing, then there would be no reason for requiring a hearing or notice thereof, and the mere fact that a hearing is required to be had, and proper notice of such hearing given, implies that some kind of objections may be interposed. The only specifications of grounds of contest of a domestic will are to be found in section 2340 of the Code of Civil Procedure, and they are not designated as such, but as the issues which may be raised and which the court is required to try and determine.

So, likewise, while no particular grounds of contesting an application for the probate of a foreign will are expressly designated, section 2352 of the Code of Civil Procedure does enumerate the findings which the trial court must make before admitting such will to probate, and these may be accepted as questions with respect to which issues may be raised, and there-

fore the grounds of such contest. But these questions arise upon the hearing of the application for probate and are to be tried by the record itself, and have not any reference to proceedings after the will has been admitted to probate here.

As these proceedings are purely statutory, and the statute makes no specific provision for the contest of a foreign will after probate, we might dispose of this proceeding by saying that the provisions of section 2352 above are exclusive, except as to the question of jurisdiction of the court of the sister state over the subject matter, and likewise the question of the jurisdiction of the Montana court, which might be raised independently of statute.

But attention is directed to one portion of section 2352, above, which provides that, when such foreign will is admitted to probate in this state, it shall "have the same force and effect as a will first admitted to probate in this state," and the argument is made that, as the probate of a domestic will or the validity of such will is subject to contest within one year after such probate, and as the foreign will when admitted has the same force and effect as the domestic will, therefore the probate of the foreign will in the courts of this state and the validity of such will are likewise subject to contest within a like period.

When the proper record of the probate of the will in the court of a sister state having jurisdiction is presented in a district court of this state likewise having jurisdiction of the subject matter, the question arises: What force and effect shall be given by the courts of this state to such record?

Section 1, Article IV, of the Constitution of the United States, provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Pursuant to this direction, section 905 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 677) was enacted, which, after providing for the manner of authenticating such records, reads: "And the said records and judicial proceedings, so authenticated, shall have

such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Section 3201 of our Code of Civil Procedure also provides: "The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority."

Section 1908 of the California Code of Civil Procedure, which is pleaded in the petition for the writ of prohibition, is as follows: "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: (1) In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person. * * *"

The decree of the superior court of California, then, must be deemed conclusive upon the court in Chouteau county, of every matter with respect to which it is conclusive in California. Section 1908 above is not very definite. A judgment in respect to the probate of a will is conclusive upon the will. Conclusive of what? In *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118, the supreme court of California, in considering an attack made upon the decree admitting the Broderick will to probate, after reviewing the authorities at length, says: "This review of the cases decided in England and in the United States establishes that it is a perfectly settled doctrine that the decision of the court to which the proof of wills is confided, whether of real or personal estate, is conclusive upon the question of the validity or invalidity of the will." The reference here to real

estate, of course, applies to real estate within the jurisdiction of that court.

It is generally conceded that a judgment in a probate proceeding is a judgment *in rem*; that is, it determines the status of the subject matter. Therefore the judgment of the California court admitting the will to probate there fixed the status of the instrument as a will and became at once conclusive upon all the world of all the facts necessary to the establishment of a will, among which are that, at the time the will was executed, the testator was of sound and disposing mind and was not acting under duress, fraud, menace or undue influence. (16 Ency. of Pl. & Pr. 1073; note to *Bowen v. Johnson*, 73 Am. Dec. at page 53 [5 R. I. 112], where the authorities are cited. See, also, the leading case of *Crippen v. Dexter*, 13 Gray [Mass.], 330.)

The decree of a court of this state first admitting a will to probate does establish such instrument as a will. It is true that such decree is not necessarily final. It may be reviewed on appeal and is subject to attack within one year in a proper proceeding instituted for that purpose. But, until set aside by a proper proceeding, such decree is conclusive of all facts necessary to the validity of the will. If the foreign will, after being admitted to probate, is subject to a like attack, it follows necessarily that it must, when such attack is made, be proved as a domestic will. But this was never contemplated, and if it was, the mere fact that such foreign will may be required to be proved, as if probate thereof had never been had, would nullify the provision of section 905 of the United States Revised Statutes above, and render meaningless the sentence quoted from section 2352, above. These views are reinforced by the provisions of section 2360 of the Code of Civil Procedure, which provides that, in order to contest the probate of a will after such will has been admitted to probate, an interested party must file a petition in writing setting forth the grounds of contest, and this petition must be filed *in the court in which the will was proved*. But a foreign will admitted to probate here is not proved in the court of this state. Section 2350 of the Code of Civil Procedure provides: "All wills duly proved and

allowed in any other of the United States, or in any foreign country or state, may be *allowed* and *recorded* in the district court of any county in which the testator shall have left any estate."

In order to entitle a foreign will to probate here, it must first appear that it was duly proved, allowed and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made or in which the testator was at the time domiciled, or in conformity to the laws of this state; and that the record is authenticated as required by section 905 of the United States Revised Statutes, above. Of course, it must also appear that there is property within the jurisdiction of the Montana court subject to administration, and that the court of the sister state likewise had jurisdiction of the subject matter. But, when these facts do appear, "it [the foreign will] must be admitted to probate * * * and letters testamentary or of administration issued thereon." (Section 2352, above.)

But it may be said, conceding all this, the decree of the California court can only be conclusive of matters with respect to which that court had jurisdiction, and that this is the meaning which has been given uniformly to the constitutional provision quoted above; that the California court did not have jurisdiction of real estate situated in Montana, and therefore the decree of the California court admitting the Ruef will to probate only establishes that instrument as a will, in so far as it affects personal property, upon the principle "of international law originated by the necessities of commercial intercourse, founded on the fiction that movable property, wherever situate, is in the actual possession of the owner at his domicile, and universally accepted by comity with all the force of domestic law, that the personal property of every man is subject to the law of his domicile" (*Irwin's Appeal*, 33 Conn. 128); that the devolution of title to real estate in this state is to be determined by the laws of this state; and that the full faith and credit clause of the United States Constitution, above, does not operate to the prejudice of this right. Assuming this to be true, and that the

general rule is that, in the absence of statute, the probate of a foreign will devising real estate situated in this state does not establish the validity of such will in this state, upon the familiar principle that the *lex rei sitae* governs as to the formalities necessary to the transfer of real estate, whether testamentary or *inter vivos*, still this state may by statute give to a foreign will, which devises real estate located in this state, the same effect as is given to a will devising personal property only, or a will executed in conformity with the laws of this state; and, if such statute is enacted, the probate of such foreign will in the courts of this state under that statute is conclusive as to the validity of the will to pass title to the land so devised. (23 Am. & Eng. Ency. of Law, 2d ed., 143.)

Section 1731 of our Civil Code provides: "A will of real or personal property, or both, or a revocation thereof made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this chapter." Provisions similar to this section, and to that portion of section 2352 quoted above, have frequently been construed.

The case of *Ives v. Salisbury*, 56 Vt. 565, presents the precise question argued here, and the decision is upon similar statutory provisions. It is held that the questions of the testamentary capacity of the testator and his freedom from undue influence are foreclosed by the decision of the court of the sister state where the will was first admitted to probate.

Under statutes almost, if not quite, identical with our sections 2350, 2351, and 2352 of the Code of Civil Procedure, and section 1731, Civil Code, above, the supreme court of Minnesota says that the ancillary probate is mostly a mere matter of form, and holds that these statutes make the judgment of a sister state, admitting the will to probate, conclusive as to the validity of the will, and that the proceedings to probate it in Minnesota are much in the nature of a suit upon a foreign judgment. (*Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N.

W. 1020; *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258; Page on Wills, sec. 30; *Green v. Alden*, 92 Me. 177, 42 Atl. 358; *Crippen v. Dexter*, above; *Irwin's Appeal*, *supra*; *Hayes v. Lienlokken*, 48 Wis. 509, 4 N. W. 584.)

Reference is made to section 1838 of our Civil Code, which reads as follows: "Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real estate within this state, by the law of this state; when relating to personal property, by the law of the testator's domicile." This section must be read in connection with section 1731, above, and without doubt refers to particular devises which are prohibited by the laws of Montana, and, probably, to conditions such as are enumerated in sections 1729, 1744, 1751, and 1752 of the Civil Code, and probably to other like questions which are not in controversy in this proceeding.

From these considerations it follows that, by giving full force and effect to the decree of the California court admitting the Ruef will to probate, and adjudging that such will was executed according to the law of California where it was executed, such will, when admitted to ancillary probate in Chouteau county, operates to transfer all property, real and personal, of the testator, to the same extent that a will drawn in Montana, in conformity to the laws of Montana, and duly probated here in the first instance, would transfer it. Section 1731, above, then, makes applicable the provisions of section 1, Article IV of the Constitution, above, and section 905 of the United States Revised Statutes, to the decree of the California court admitting the Ruef will to probate, even though that will devises real estate situated in Montana, and that decree is conclusive upon the court in Chouteau county to the same extent respecting the Ruef will as if it transferred personal property only.

We think that the questions of the testamentary capacity of the testator and his freedom from duress, fraud, misrepresentation, or undue influence, when executing the Ruef will, are foreclosed by the decree of the California court, and that

the district court of Chouteau county is without jurisdiction to inquire into them.

The motion to quash the alternative writ and dismiss the proceedings is overruled. It is ordered that the peremptory writ of prohibition issue according to the prayer of the petition.

Writ issued.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

HICKEY & CO., RESPONDENT, v. KAUFMAN ET AL., AP-
PELLANTS.

(No. 2,253.)

(Submitted April 7, 1906. Decided April 9, 1906.)

Appeal—Briefs—Specifications of Error.

1. Where appellant's brief contains no specification of errors, as required by the Supreme Court, Rule X (30 Mont. xxxviii, 82 Pac. ix), the judgment will be affirmed.

Appeal from District Court, Silver Bow County; J. B. McClerman, Judge.

ACTION by T. F. Hickey & Co. against Jake Kaufman and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Mr. C. M. Parr, for Appellants.

Messrs. Mackel & Meyer, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendants appealed to this court from a judgment, and from an order of the district court denying them a new trial.

Appellants' brief does not contain any specification of errors relied upon, as required by Rule X of the Rules of this court (30 Mont. xxxviii, 82 Pac. ix). Upon the authority of the following cases the judgment and order are affirmed: (*Cole v. Ryan*, 24 Mont. 122, 60 Pac. 991; *Rehberg v. Greiser*, 24 Mont. 487, 62 Pac. 820; *Casey v. Thieviege*, 27 Mont. 516, 71 Pac. 755; *Larkin v. Butte & Boston C. M. Co.*, 28 Mont. 41, 72 Pac. 304.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing decision.

STATE EX REL. BREEN, RELATOR, v. DISTRICT COURT OF
SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

(No. 2,291.)

(Submitted April 2, 1906. Decided April 11, 1906.)

Contempt—Record—Sufficiency—Certiorari—Witnesses—District Judges.

Certiorari—Contempt—Judgment—Record—Sufficiency.

1. Under Code of Civil Procedure, section 2172, an order declaring a person guilty of a direct contempt must recite the facts upon which the conclusion that the contemnor is guilty is based. The district court in an order adjudging an attorney at law guilty of such contempt merely recited that while the court was in session, the contemnor addressed it in an insolent manner and contemptuously attempted to call the presiding judge as a witness to prove certain scandalous matter. Held, on *certiorari*, that the order—the record of the case—was insufficient to meet the requirements of section 2172 *supra*.

Certiorari—Contempt—Record.

2. On *certiorari* to review an order of the district court adjudging one guilty of a direct contempt, the supreme court may not look beyond the order adjudging the contemnor guilty—which constitutes the record of the case (Code Civ. Proc., sec. 2172)—to determine from the facts whether or not the judgment was proper.

Challenge to Panel—Witnesses—District Judges.

3. *Obiter*: A judge of the district court may be called as a witness when the regularity of the drawing of a jury in a criminal prosecution is questioned by a challenge to the panel, inasmuch as he orders such drawing and directs the clerk during its progress (Code Civ. Proc., sec. 261), and under Penal Code, section 2038, both judicial and ministerial officers whose irregularity is complained of, may be called upon to testify.

CERTIORARI by the state, on the relation of Peter Breen, against the district court of Silver Bow county and Michael Donlan, a judge thereof, to review an order adjudging relator guilty of contempt. Order annulled.

Mr. Jesse B. Roote, for Relator.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari to the district court of Silver Bow county to review an order adjudging Peter Breen, Esq., an attorney at law, guilty of contempt.

On March 6th of this year there was on trial in department 3 of said court a cause entitled "*State of Montana v. Harry Smith*," the said Breen appearing as counsel for defendant. During the progress of the trial, the court made and entered the following order: "Whereas, the above-entitled court, on the 6th day of March, 1906, was duly in session, the Honorable Michael Donlan, Judge, presiding, and there was then and there on trial before the said court a case entitled the '*State of Montana v. Harry Smith*,' and whereas the above-named Peter Breen, an attorney at law, and an attorney in the said case, while the court was duly in session, knowingly and willfully addressed the court in a contemptuous, insolent, and

disrespectful manner, and in an insolent, contemptuous, and sneering manner called, and attempted to call, the said Honorable Michael Donlan, judge as aforesaid, to prove and attempted to prove by said judge certain scandalous matters, which the said Peter Breen alleged had transpired in the said court on a former occasion, and which allegations were made for the purpose of reflecting upon the honesty and judicial integrity of said judge and which did reflect upon the honesty and integrity of said judge, and thereupon the court then and there found, decided, adjudged, and decreed that the said Peter Breen was guilty of contemptuous and insolent behavior toward the judge of the said court, while holding the court, tending to interrupt the due course of a trial, and which did interrupt the due course of the trial of said cause, and immediately after so finding the said Peter Breen guilty then and there ordered, adjudged, and decreed, and sentenced that the said Peter Breen should pay a fine of five hundred (\$500.00) dollars, and to be committed as required by law in a case of failure to pay the said fine. Now, therefore, it is ordered, adjudged, and decreed that the said Peter Breen forthwith pay the said five hundred (\$500.00) dollars to the clerk of this court, and that in default thereof the said Peter Breen be committed to the county jail of said county until the said fine has been paid for at the rate of two (\$2.00) dollars per day." Thereupon the present proceeding was brought to have the order annulled, for that it does not appear from the facts set forth therein that the court had jurisdiction to punish the relator.

Section 2170 of the Code of Civil Procedure declares disorderly conduct, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of the trial or other judicial proceeding, a contempt. Contempts may be direct or indirect. If direct—that is, in the immediate view and presence of the court or of the judge at chambers—they may be punished summarily. In such case the order or judgment of conviction must recite the facts upon which the conclusion or adjudgment that the contemnor is

guilty is based (Code Civ. Proc., sec. 2172), and this order or judgment constitutes the record of the case. If the contempt is indirect—that is, not in the immediate view or presence of the court or judge at chambers—before the court can acquire jurisdiction to punish it, an affidavit must be presented setting forth the facts constituting the contempt, and thereupon the court must hear proof.

The conviction here was for a direct contempt. The judgment, however, is wholly insufficient to meet the requirements of the statute. It does not contain, even by appropriate reference to the proceedings before the court, anything to show what the matters referred to as scandalous were, nor any fact tending to show what the manner of the relator was. It states conclusions and inferences only, drawn by the judge from the facts as they actually transpired, thus leaving this court no alternative but to accept these conclusions or to hold the order invalid. The purpose of the statute is to require the court to set forth the jurisdictional facts, so that the propriety of the judgment of conviction may be examined and reviewed. If adjudged sufficient as it stands, the order complained of would be conclusive upon this court, and review of it, as to the sufficiency of the facts to put the power of the court in motion, would be impossible.

In a given case, where the contempt consists in the manner or bearing of the contemnor, it may be difficult for the court to set forth the facts in any other form than by a shorthand rendering thereof, so to speak; but it is, nevertheless, necessary that the attendant circumstances be set forth, so that the propriety of the conclusion reached may be determined.

The relator has presented this case in his affidavit, upon the theory that this court may look beyond the order and determine from the facts whether or not the judgment of the district court was proper. In such case, however, we may not look beyond the contents of the order itself.

It appears from the facts stated in the petition that at the time the order was made counsel were about to enter upon the selection of a jury to try the case of *State v. Smith*, and that the

relator offered a challenge to the panel, accompanied by a written offer to prove the facts therein stated, and giving a list of the witnesses whose testimony he would offer, including, among others, the judge himself. The court evidently proceeded upon the theory that the relator had no right to present the challenge, or, if he had, to call the presiding judge as a witness to establish the truth of the facts therein stated, and was of the opinion that the whole proceeding was not warranted by law, especially the offer to call the judge as a witness. We remark that, if such was the theory of the court, it was wholly wrong, because a party has a right to challenge a jury on the ground of a material departure from the law in respect to the drawing and return thereof, or on the ground of the intentional omission of the sheriff to summon one or more of the jurors drawn (Penal Code, sec. 2034); and where the facts stated as the grounds of the challenge are denied by the adverse party the court must proceed to try the question of fact thus presented, and the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined as witnesses. (Penal Code, sec. 2038.) The judge orders the drawing of the jury and directs the clerk during its progress, (Code Civ. Proc., sec. 261.) He may, therefore, be called as a witness when the question as to the regularity of the drawing is presented by a challenge. We shall not enter here into a discussion of this feature of the proceedings, since the record of them is not properly before us.

The order itself being insufficient to show that the court had jurisdiction to make it, it is void and must be annulled. It is so ordered.

Order annulled.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: I concur in the conclusion.

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125	37

STATE EX REL. HALL ET AL., RELATORS, v. DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT ET AL., RE-
RESPONDENTS.

(No. 2,289.)

(Submitted April 3, 1906. Decided April 11, 1906.)

*Justices of the Peace—Appeals—Filing and Serving Notice—
Statutes—Jurisdiction—Prohibition.*

Prohibition—Justice of the Peace Courts—Appeal—Requisites—Statutes—
Jurisdiction.

1. A notice of appeal from a justice of the peace to the district court was served on counsel for the opposite party on one day and not filed in the justice's court until three days later. A motion to dismiss the appeal on the ground that it had not been filed and served in accordance with the provisions of Code of Civil Procedure, section 1760, was overruled by the district court. *Held*, on application for writ of prohibition, that under this section the filing of the notice in the justice's court must precede, or be contemporaneous with, the service thereof on the adverse party or his counsel, and that by the failure of the appellant to observe the mandate of this section, the district court was not invested with jurisdiction of the cause.

Appeals—Justice of the Peace Courts—Statutes.

2. Appeals from justice of the peace to district courts are matters of statutory regulation, and the provisions of the law relative to the method to be pursued in taking such appeals must be strictly followed in order to divest the former of, and invest the latter with, jurisdiction.

ORIGINAL application by Amos C. Hall and others for writ of prohibition to restrain the district court of the fifth judicial district, and Honorable Lew L. Callaway, judge thereof, from proceeding to try an appeal from a justice of the peace court. Writ issued.

Messrs. Clark & Duncan, for Relators.

The relators contend that by reason of the fact that no copy of the notice of appeal was served upon them or their attorneys on the day or after the notice was filed with said justice, no appeal of said cause was ever taken or perfected. (*Courtright v. Perkins*, 2 Mont. 404; *Johnson Co. Sav. Bank v. Joe Klaffki Co.*, 26 Mont. 384, 68 Pac. 410; *Slocum v. Slocum*, 1 Idaho,

589; *Daniels v. Daniels*, 9 Colo. 123, 10 Pac. 657; *Alvord v. McGauhy*, 4 Colo. 97; *Bacon v. Lamb*, 4 Colo. 474; *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 264, 52 Pac. 575; *Lyon Co. v. Washo Co.*, 8 Nev. 177; *Johnson v. Badger Mill etc. Min. Co.*, 12 Nev. 261; *Reese G. M. Co. v. Rye Patch etc. Co.*, 15 Nev. 341; *Puckett v. Moody*, 17 Wash. 609, 50 Pac. 494; *Hastings v. Hallick*, 10 Cal. 31; *State ex rel. Alladio v. Superior Court of King Co.*, 17 Wash. 54, 48 Pac. 733; *Columbet v. Pacheco*, 46 Cal. 650; *Dinan v. Stewart*, 48 Cal. 566; *Buffendeau v. Edmondson*, 24 Cal. 94.) All of the above decisions were rendered under a statute identical with that of this state, which governs appeals from justice courts.

The transcript on appeal, together with the so-called undertaking on appeal, and papers and files were not filed with the clerk of the district court within ten days after perfecting the appeal, by reason of the neglect and fault, not of the justice of the peace, but of the attorney for the appellants in said cause, all of which appears from the affidavit of the justice of the peace who tried the case and made the transcripts, and also the affidavit of the attorney for the appellants, which are a part of the record in this proceeding herein.

The relators are aware that if the justice alone had been at fault, the so-called appellants would have had a remedy, but where the fault lies at the door of such appellants' attorney, they have no remedy. (*Miller v. Walker* (Neb.), 101 N. W. 332; *Lincoln Brick etc. Works v. Hall*, 27 Neb. 874, 44 N. W. 45; *Houk v. Knop*, 2 Watts, 72; *Sherwood v. McKinney*, 5 Whart. 435; *Bradway v. Clippen*, 1 White & W. Civ. Cas. (Ct. App.), par. 306; see 31 Century Digest, cols. 1685-1694; *Bowen v. Patterson*, 116 Ga. 814, 43 S. E. 25; *Carter v. Monnastes*, 19 Or. 538, 25 Pac. 29; *Goodenow v. Stafford*, 27 Vt. 437; *Washington v. Marcrum*, 106 Ga. 300, 31 S. E. 779.)

Mr. John B. Clayberg, and Mr. S. V. Stewart, for Respondents.
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MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In August, 1905, an action was commenced in the justice of the peace court of Union township, Madison county, by Amos C. Hall et al. against J. H. Owen et al. By agreement the venue was changed to Hot Springs township, where the cause was tried, a verdict returned in favor of the plaintiffs, and judgment entered on the verdict on November 28, 1905. On December 1st a notice of appeal was served on counsel for plaintiffs, and on December 4th this notice was filed in the justice of the peace court. The transcript of the justice's docket and the papers in the case were lodged with the clerk of the district court, and on January 2, 1906, plaintiffs moved to dismiss the appeal on several grounds, among which were, that the pretended appeal had not been perfected as required by law, and that a notice of appeal had not been filed and served upon the plaintiffs or their counsel as required by law. This motion was overruled, and the district court being about to proceed to try the cause, an application was made to this court for a writ of prohibition to restrain the district court and the judge thereof from further proceeding. An alternative writ was issued and on return an answer was filed. Upon the hearing it was conceded that the petition and answer correctly state the facts.

The only question for determination is: Did the district court acquire jurisdiction of the case of *Hall et al. v. Owen et al.*? Section 1760 of the Code of Civil Procedure provides for appeals from the justice of the peace court to the district court, and, respecting the manner of effecting such appeals, prescribes: "The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or his attorney." These appeals are purely matters of statutory regulation (*State v. Whaley*, 16 Mont. 574, 41 Pac. 852, and cases cited), and it becomes important, then, to know whether the order in which the notice of appeal is filed and served is of consequence. The statute provides that such notice must

be filed and served. In this instance the notice was served on one day and not filed until three days later.

The question is not a new one. It has been before this court and before the supreme courts of California, Nevada, Colorado, Idaho, and Washington. An early California statute provided: "Art. 1071, sec. 337. The appeal shall be made by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney." (Wood's California Digest, 1850-58, p. 210.) Construing this statute in *Hastings v. Halleck*, 10 Cal. 31, the supreme court of that state held that the filing of the notice of appeal must precede or be contemporaneous with the service, and if the service preceded the filing, the notice was of no effect and did not perfect the appeal. This was followed in *Buffendeau v. Edmondson*, 24 Cal. 94, *Warner v. Holman*, 24 Cal. 223, *Moulton v. Ellmaker*, 30 Cal. 528, *Boston v. Haynes*, 31 Cal. 107, *Foy v. Domec*, 33 Cal. 317, and in *Lynch v. Dunn*, 34 Cal. 518.

The statute of Nevada in force in 1873 was identical with the California statute above. (Compiled Laws of Nevada, 1873. Title IX, Chapter I, sec. 331.) In *Lyon County v. Washoe County*, 8 Nev. 177, in construing this statute, the supreme court of Nevada said: "It is well settled that to render an appeal effectual the filing of the notice of appeal must precede or be contemporaneous with the service of the copy; otherwise that which purports to be a copy fails as such for want of an original to support it. It is ordered that the appeal be dismissed." This decision has since been affirmed in *Johnson v. Badger M. & M. Co.*, 12 Nev. 261, and in *Rees Gold etc. Min. Co. v. Rye Patch Con. etc. Min. Co.*, 15 Nev. 341, and in *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 264, 52 Pac. 575, decided in 1898.

The Colorado statute in force in 1879 is as follows: "Sec. 339. The appeal shall be made by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and executing an undertaking as hereinafter prescribed,

and serving a copy of the notice upon the adverse party or his attorney." (Colo. Code Civ. Proc., Title IX, Chapter XXXV, p. 125.) With these provisions in force, the supreme court of Colorado in *Alvord v. McGauhy*, 4 Colo. 97, held that unless the filing of the notice of appeal precedes or is contemporaneous with the service thereof, it is ineffectual for any purpose and the appeal is not perfected. This was followed and approved in *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657, construing a statute then in force in all material respects the same as the one considered in *Alvord v. McGauhy* above.

The Idaho statute in force in 1875 was also identical with the California statute above. (Laws of Idaho, 1864, Title IX, Chapter I, p. 141.) This statute was considered in *Slocum v. Slocum*, 1 Idaho, 589, and the supreme court of Idaho said: "By this statute it becomes necessary as a part of the notice that it should be filed, and consequently it must precede or be contemporaneous with the service of a copy on the adverse party. This has been decided in California under a statute similar to ours, and in adopting its statute we adopt the construction which has been given to it by the courts of that state. Before the court can take jurisdiction of an appeal the filing of the notice and the service of a copy thereof as prescribed by the statute must be had, and before the notice is filed, it possesses none of the elements of a notice, and consequently there can be no copy of it."

The Code of Washington providing for appeals from a justice of the peace court to the superior court, in force in 1897, among other things provided: "Sec. 1631. Such appeal shall be taken by filing a notice of appeal with the justice and serving a copy on the adverse party or his attorney." (Hill's Annotated Statutes and Codes of Washington, Code Civ. Proc., p. 612.) This section was considered in *State ex rel. Alladio v. Superior Court*, 17 Wash. 54, 48 Pac. 733, where it is held that the filing of the notice must precede the service, otherwise the superior court does not acquire jurisdiction. A similar provision respecting the filing and service of a statement was considered in *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241, and the same conclusion reached.

In 1876 we had in this state the following provision respecting appeals to this court from the district courts: "Sec. 370. The appeal shall be made by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney." (Codified Statutes of Montana [7th Session, 1871-72] Title IX, Chapter I, p. 107.) This statute is identical with the California, Nevada and Idaho statutes above, and in all material respects the same as the Washington and Colorado statutes quoted. In *Courtright v. Berkins*, 2 Mont. 404, this court said: "The statutes of California and Nevada regulating appeals are the same as those of this territory. The courts of these states hold that the filing of the notice of appeal must precede or be contemporaneous with the service of the copy thereof to render an appeal effectual. The failure of the appellants to comply with the Civil Practice Act in this proceeding is an error which affects the jurisdiction of this court.. * * * Appeal dismissed."

But it may be said that the statutes considered in the cases cited above, except the *Washington Case*, relate to appeals from courts of record, while the statute now under consideration relates to appeals from a justice of the peace court, and that a different construction should be given to it. The district court evidently proceeded upon this theory, following the decisions of the supreme courts of California and Idaho. After the California cases above were decided, the supreme court of California in *Coker v. Superior Court*, 58 Cal. 177, in considering sections 974 and 978 of the California Code of Civil Procedure, which correspond with sections 1760 and 1763 of our Code of Civil Procedure, without giving any reason for its conclusion and without referring to its former decisions above, announced the doctrine that in order to effectuate an appeal from a justice of the peace court, three things are necessary, namely: "The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking. * * * The mere order in which they are done

within that time is not material." This decision was followed in *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. 509; s. c. 71 Cal. 550, 12 Pac. 672. That the decision in the *Coker Case* was wholly illogical is demonstrated when the legitimate result of such holding is reached, as was done in *Dutertre v. Superior Court*, 84 Cal. 535, 24 Pac. 284. In that case the undertaking on appeal was filed eleven days before the notice of appeal was served, and eleven days before the adverse party had any intimation that an appeal would be taken, and notwithstanding the California Code, section 978 above, specifically confers upon such adverse party the right to except to the sufficiency of the sureties within five days after the filing of the undertaking, as does our section 1763 above, the court held, following the *Coker Case* above, that the appeal was nevertheless perfected, a conclusion which can have but one result, namely, the annulment of the provision permitting the adverse party to except to the sufficiency of the sureties, for that right is only in existence for five days after the undertaking is filed; and yet a court has the same authority for saying that the undertaking on appeal may be filed before the filing or service of the notice, as it has for saying that the notice may be served before it is filed. Either conclusion is directly opposed to the express language or the evident meaning of the statute.

In *Reynolds v. Corbus*, 7 Idaho, 481, 63 Pac. 884, the same doctrine is announced as in the *Coker Case*. We think the result reached in the *Dutertre Case* above is nothing short of judicial legislation, or, what is the same thing, a construction by a court of plain language to mean what it does not say. There is not any reason apparent which will give to the same language one meaning when it applies to the district court practice, and a contrary meaning when applied to the justice of the peace court practice. Assuming that the words, "The order of service is immaterial" were intended to mean that it is immaterial whether the notice is first filed or served, it is worthy of consideration to note that it required an Act of the legislature to add those words to section 370 of the district court Practice Act of 1871-72, and this court cannot undertake to amend section 1760 above

in the like particular, and nothing short of an appropriate amendment would justify the conclusion for which respondents are contending. That legislation is needed is apparent, but this court ought not to effect it by construction which does violence to the language employed.

The history of our statutes regulating appeals is of interest. By an Act approved January 12, 1872, a Civil Practice Act was adopted which contained section 370 quoted above, which applied to appeals to the supreme court. It also contained section 411, which applied to appeals from the probate court, and section 742, which applied to appeals from the justice of the peace court. These sections were all of like import. By an Act approved February 16, 1877, a year after the decision in *Court-right v. Berkins*, above, was rendered, sections 370 and 411 of the Practice Act of 1872 were repealed, and new sections adopted in lieu thereof. Section 409, enacted in lieu of 370, above, was of like import, but to it was added the clause "the order of service is immaterial," etc. This Act re-enacted section 411 above in terms, as section 437, and did not assume to change in any manner section 742 of the Practice Act of 1872. These sections of the Act of 1877, and section 742 above, were carried into the revision of 1879, First Division, as sections 409, 437 and 802, respectively; and into the Compiled Statutes of 1887, as sections 422, 450 and 822, First Division. The section respecting appeals from the probate court became nugatory upon the adoption of the Constitution. The sections respecting appeals from the district court and from the justice of the peace court were carried into the Code of Civil Procedure of 1895, as sections 1724 and 1760, respectively.

It is to be observed that since 1877 there has not been any material change in any of these sections referred to; that while the section respecting the method to be pursued in appealing from the district to the supreme court was amended in 1877, the sections referring to appeals from the justice of the peace to the district court has continued in force without any substantial alteration for more than thirty years, and has been re-enacted over and over again without modification and with the full

knowledge which the legislatures had of the construction given a similar statute as early as 1876. We must presume, therefore, that in amending the district court Practice Act and repeatedly re-enacting the justice of the peace Practice Act without alteration, the legislature intended that the construction given in *Courtright v. Berkins*, should apply to the Practice Act regulating appeals from a justice of the peace court; and as it is the province of this court to determine the intention of the legislature, if possible, and apply the law as thus ascertained, we are not warranted now in departing from the former holding of this court and from the rule announced by other courts in construing like statutory provisions. Neither do we think that the provisions of sections 778 and 3453 of the Code of Civil Procedure have any application to the question presented in this proceeding.

We are satisfied that the provisions of section 1760 above were intended to be, and are in fact, mandatory, and that a party wishing to appeal from a justice of the peace court must pursue the statutory method strictly, and a failure to do so does not divest the justice of the peace court of its jurisdiction. (2 Ency. of Pl. & Pr. 16; *Green v. Castello*, 35 Mo. App. 127; *Sholty v. McIntyre*, 136 Ill. 33, 26 N. E. 655.)

As disclosed by the record before us, the district court of Madison county was without jurisdiction to try the case of *Hall et al. v. Owen et al.*, and a peremptory writ of prohibition should issue in conformity with the prayer of the petition. The writ is directed to issue accordingly.

Writ issued.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

Rehearing denied June 16, 1906.

TANNER, RESPONDENT, v. BOWEN, APPELLANT.

(No. 2,259.)

(Submitted April 7, 1906. Decided April 16, 1906.)

Torts—Causes of Action—Assignment—Satisfied Claim—Release.

1. The owner of a horse let the same to plaintiff, a livery-stable keeper, who hired the horse to defendant to drive. After being driven the horse died from the alleged negligence of defendant, whereupon the owner asserted a claim against both plaintiff and defendant. Plaintiff admitted the owner's claim, paid him the value of the horse in satisfaction thereof, and took an assignment of the owner's cause of action against defendant, and as such assignee sued defendant to recover the value of the horse, alleging that the cause of its death resulted from defendant's negligence. *Held* that, as plaintiff's payment of the value of the horse to the owner thereof satisfied any cause of action that he had for the loss of the horse, plaintiff was not entitled to recover for such loss as the owner's assignee.

Appeal from District Court, Teton County; J. E. Erickson, Judge.

ACTION by Ed. Tanner against J. R. Bowen. From a judgment for plaintiff and from an order denying him a new trial, defendant appeals. Reversed.

Mr. E. L. Bishop, for Appellant.

That Devlin would have a right of action against either Tanner or Bowen for the negligence of the latter in driving or caring for the horse in question with Tanner's consent and in the course of Tanner's business, is too well settled to require citation of authorities. In such cases "The rule which makes one satisfaction or release a bar to further claims for the same tort is founded in good reason." (*Chapin v. Chicago etc. Ry. Co.*, 18 Ill. App. 50; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091; *Seither v. Philadelphia Traction Co.*, 125 Pa. St. 397, 11 Am. St. Rep. 905, 17 Atl. 338, 4 L. R. A. 54; *Tompkins v. Clay St. Ry. Co.*, 66 Cal. 163, 4 Pac. 1165; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344.)

"In torts the relation of principal and agent does not exist; they are all wrongdoers, and may be sued jointly or separately." (*Berghoff v. McDonald*, 87 Ind. 558; *Illinois C. Ry. Co. v. Coley* (Ky.), 89 S. W. 237; *Mayer v. Thompson etc. Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88, 16 South. 623, 28 L. R. A. 433; *Indiana etc. Co. v. Lippincott Glass Co.* (Ind.), 72 N. E. 183; *Greenberg v. Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911, 63 N. W. 93, 28 L. R. A. 439.) Therefore plaintiff and defendant were joint tort-feasors, and the satisfaction given by plaintiff for the joint tort inured to the benefit of defendant, and would satisfy and discharge the joint cause of action, notwithstanding an express agreement to the contrary. (*Abb v. Northern Pac. Ry. Co.*, 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 955, 58 L. R. A. 293; *Jones v. Chism*, 73 Ark. 14, 83 S. W. 315; *McBride v. Scott*, 132 Mich. 176, 102 Am. St. Rep. 416, 93 N. W. 243, 61 L. R. A. 445; *Denver etc. Ry. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 503; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 136.)

The attempted assignment was ineffectual for any purpose, and did not change the rights of the parties in any respect. (*Gross v. Pennsylvania etc. R. R. Co.*, 47 N. Y. St. Rep. 374, 20 N. Y. Supp. 28; *Seither v. Philadelphia Traction Co.*, 125 Pa. St. 397, 11 Am. St. Rep. 905, 17 Atl. 338, 4 L. R. A. 54; *Boyer v. Bolender*, 129 Pa. St. 324, 15 Am. St. Rep. 723, 18 Atl. 127; *Baker v. Secor*, 51 Hun, 643, 4 N. Y. Supp. 303.)

Inasmuch as the defense of payment and satisfaction was first developed upon the trial by the disclosure of the plaintiff, and the evidence of it was admitted and submitted to the court upon the motion to direct a verdict without objection, appellant is entitled to the benefit thereof. (*Capital Lumber Co. v. Barth* (Mont.), 81 Pac. 994; *Prosser v. Montana Cent. Ry. Co.*, 17 Mont. 388, 43 Pac. 81; *Peck v. Goodberlet*, 109 N. Y. 180, 16 N. E. 350; *Hawn v. Seventy-six etc. Water Co.*, 74 Cal. 418, 16 Pac. 196; *England v. Gripon*, 15 La. Ann. 304; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135; *Gardner v. Buckbee*, 3 Cow. 120, 15 Am. Dec. 256; *Eastwood v. Retsof Min. Co.*, 68 N.

Y. St. Rep. 38, 34 N. Y. Supp. 196; *Bunnell v. Rio Grande etc. Ry. Co.*, 13 Utah, 314, 44 Pac. 930.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts disclosed by the record are that John H. Devlin was the owner of a certain horse and let it to the plaintiff Tanner, who was a livery-stable keeper at Conrad, Teton county, for use in his livery business. The defendant Bowen hired a team and buggy from Tanner on December 1, 1904, to drive to Chouteau, and the Devlin horse and another were furnished to him by Tanner. Bowen made the trip with the team to Chouteau, and on the following morning it was ascertained that the Devlin horse had died. Devlin asserted a claim for the value of the horse against both Tanner and Bowen and demanded a settlement for the same from each. Upon the trial it was made to appear that Tanner admitted Devlin's claim, acknowledged his own liability, paid to Devlin the value of the horse in satisfaction of Devlin's claim, took an assignment of Devlin's cause of action as against Bowen, and as such assignee brought this action to recover from Bowen the value of the horse, alleging in his complaint that the death of the horse was caused by negligence on the part of Bowen. The answer denies any negligence on Bowen's part. A verdict was returned in favor of the plaintiff, a judgment entered thereon, and from the judgment and an order denying him a new trial, the defendant appealed.

The only error assigned in the brief of appellant is that the court erred in refusing to instruct the jury to return a verdict for the defendant as requested by him. In discussing this alleged error, counsel for appellant makes three distinct contentions, only one of which it will be necessary to consider.

It is said that plaintiff Tanner, having paid to Devlin the amount of Devlin's claim in satisfaction of the same, thereby discharged Bowen from liability. As to whether Tanner was in fact liable might be a question, but this liability was admitted. The payment by Tanner to Devlin and the attempted assign-

ment of Devlin's cause of action operated as a complete satisfaction of Devlin's claim and a release of Tanner from any further liability. In *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107, it is said: "The validity and effect of a release of a cause of action do not depend upon the validity of the cause of action. If the claim is made against one and released, all who may be liable are discharged, whether the one released was liable or not." The principle underlying this decision is that if, when the release was given, Devlin was asserting against Tanner a liability for the same act for which Tanner now asserts the liability of Bowen, the two causes of action are the same and the release of one discharges the other. The decision above is referred to with approval, and the doctrine there announced is again asserted, in *Miller v. Beck & Co.*, 108 Iowa, 575, 79 N. W. 344, and numerous other cases are cited in support of the conclusion reached. (1 Cyc. 317.)

If Devlin, instead of merely presenting his demand against Tanner and Bowen separately, had sued each, as he might have done, and had recovered a judgment against each, and if Tanner had then paid the judgment against himself and had taken an assignment from Devlin of the judgment against Bowen, the situation would not have been different from that which is presented by this record, and under those circumstances it is quite clear that the judgment against Bowen could not have been enforced.

A case directly in point is *Gross v. Pennsylvania etc. R. Co.*, 47 N. Y. St. Rep. 374, 20 N. Y. Supp. 28. The plaintiff recovered separate judgments against the Pennsylvania etc. Railroad Company and the Central New England etc. Railroad Company for an injury caused by the negligent acts of those companies. The New England company paid the judgment against it and took an assignment of the judgment against the Pennsylvania company. The Pennsylvania company then moved the court to cancel the judgment against it. In reversing the trial court for refusing this motion, the supreme court of New York said: "It is claimed by the assignee of the judgment that, as between it and the defendant (the Pennsylvania company), it was the

negligence of the latter that caused the injury, * * * and that hence it is not precluded from recovering indemnity or contribution from its cotort-feasor. This may well be, but has no effect on this application. On this motion the Central New England etc. Company has but the same rights as its assignor, the plaintiff. As the plaintiff could not collect anything from the defendant after satisfaction by the other company, his assigns cannot."

Section 571 of the Code of Civil Procedure provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of, or before, notice of the assignment," etc. If, then, when Devlin assigned his pretended cause of action against Bowen to Tanner, he (Devlin) had been paid by Tanner for all damages sustained by him, under the circumstances of this case the defense of payment or satisfaction could have been interposed by Bowen, and when these facts were developed upon the trial, the defendant's request for an instruction for a verdict in his favor should have been granted. Devlin having been paid and satisfied by Tanner, did not have any cause of action against Bowen which he could assert in court himself, and, of course, if he could not assert it, his assignee could not.

The judgment and order are reversed, and the cause remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing decision.

MUSSELSHELL CATTLE COMPANY, RESPONDENT, v.
WOOLFOLK ET AL., APPELLANTS.

(No. 2,277.)

(Submitted April 2, 1906. Decided April 16, 1906.)

*Live Stock—Trespass—Uninclosed Lands—Injunction—Refusal
to Dissolve.*

Live Stock—Uninclosed Lands—Trespass.

1. One who knowingly and willfully drives his stock upon uninclosed lands of another is guilty of a trespass and must respond in damages at the suit of the latter.

Live Stock—Uninclosed Lands—Continued Trespasses—Injunction.

2. While equity will not enjoin the commission of a trespass when there is an adequate remedy at law, yet where it appeared that the defendants willfully and repeatedly, though warned to desist, drove bands of sheep upon plaintiff's uninclosed land, thereby depasturing it and causing water necessary for plaintiff's cattle to be consumed, and threatened to continue such trespasses, and where the record on appeal showed that plaintiff's title to the land in question was not controverted, the trial court was justified in granting a temporary injunction in view of the probable impossibility of accurately estimating the damages in money and to prevent a multiplicity of suits, and its order refusing to dissolve it was correct.

*Appeal from District Court, Yellowstone County; C. H. Loud,
Judge.*

ACTION by the Musselshell Cattle Company against Alex. Woolfolk and another. From an order refusing to dissolve a temporary injunction, defendants appeal. Affirmed.

Mr. Harry A. Groves, and Mr. J. B. Herford, for Appellants.

The question presented by the record is this: "When is a person entitled to a writ of injunction to restrain a naked trespass?" Courts of equity do not ordinarily extend the harsh remedy of injunction to cases of trespass, but leave the redress of such grievances to the courts of law where originally jurisdiction in such matters was lodged. The general rule is that in order to give the court of equity jurisdiction to enjoin torts

to property, two conditions must occur: 1. The complainant's title must be admitted or be established by a legal adjudication; and 2. The threatened injury must be of such a nature as will cause irreparable damage, not susceptible of complete pecuniary compensation. The courts have generally accepted the statement of the rule here given as correct, although they have encountered considerable difficulty in its application to the facts of the various cases that have arisen out of the complication of human transactions. (*Carney v. Hadley*, 32 Fla. 344, 37 Am. St. Rep. 101, 14 South. 4, 22 L. R. A. 237; *High on Injunctions*, 3d ed., secs. 697, 699, 701.)

The state legislature has provided a full, adequate and complete remedy for such acts as are described in respondent's complaint. (Session Laws of 1903, p. 192.) For trespasses of the kind described in respondent's complaint the law has provided a clear and definite rule of damages, so that on this phase of the question the legal remedy is wholly adequate. The trespasses are not of a character that a court of equity will enjoin to prevent a multiplicity of suits. This rule is clearly stated in *Carney v. Hadley*, *supra*. The trespasses in the *Heaney Case*, 10 Mont. 590, 27 Pac. 379, the *Mullins Case*, 27 Mont. 364, 71 Pac. 165, and the *Harley Case*, 27 Mont. 388, 71 Pac. 407, were of the same nature as those in this case as to being continuous or repeated, and in each of the cases the court refused to interfere by injunction. In fact neither the court nor counsel deemed the point worthy of mention.

To justify granting a preliminary injunction, the plaintiff's right must be certain as to the law and facts. In passing upon the facts of each case, it is the right and duty of the court or judge to require a full disclosure of all the facts; and if it is apparent that such disclosure has not been made, relief should be refused. (*Campbell v. Flannery*, 29 Mont. 246, 74 Pac. 450.) When it appears from the nature of the case and all the facts that a party is not entitled to a temporary injunction, the granting of such is not a matter of discretion, and is reversible error. (*Schilling v. Reagan*, 19 Mont. 508, 48 Pac. 1109.)

Mr. W. M. Johnson, for Respondent.

It is no longer an open question as to whether plaintiff would be entitled to damages for such trespasses as are set out in the complaint herein. The boundaries need not be marked in any way or manner, providing they are known to the defendants or his employees. (*Monroe v. Cannon*, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863; 2 Cyc. 398; *Logan v. Gedney*, 38 Cal. 579; *Harrison v. Adamson*, 76 Iowa, 337, 41 N. W. 34; *Erbes v. Wehmeyer*, 69 Iowa, 85, 28 N. W. 447; *Otis v. Morgan*, 61 Iowa, 712, 17 N. W. 104; *Delaney v. Errickson*, 11 Neb. 533, 10 N. W. 451; *Addington v. Canfield*, 11 Okla. 204, 66 Pac. 355; *Bileu v. Paisley*, 18 Or. 47, 21 Pac. 934, 4 L. R. A. 840; *Poin-dexter v. May*, 98 Va. 143, 47 L. R. A. 588, 34 S. E. 971.) The rule now is that equity will interfere to prevent a multiplicity of suits between the same parties and in regard to the same subject matter. It is not necessary that there be several defendants in order to successfully invoke the aid of equity to restrain a continuing or repeated trespass. There would be no more annoyance, vexation or expense in maintaining six actions against as many different defendants than in maintaining the same number of separate actions against the same defendant, so that there never was any reason for this restriction upon the right of a court of equity to enjoin trespasses. (1 *Spelling on Extraordinary Legal Remedies*, secs. 14, 16; *Eaton on Equity*, 567, 587; *Wheelock v. Noonan*, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67; *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 7 Am. St. Rep. 671, 4 South. 298; *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828, 24 N. E. 686-691, 8 L. R. A. 578; *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097; *Galway v. Metropolitan etc. Ry. Co.*, 128 N. Y. 132, 28 N. E. 479-482, 13 L. R. A. 788; *Port of Mobile v. Louisville etc. Ry. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 South. 107-111; *Indian River etc. Co. v. East Coast T. Co.*, 28 Fla. 387, 29 Am. St. Rep. 258, 10 South. 480; *Godfrey v. Black*, 39 Kan. 193, 7 Am. St. Rep. 544, 17 Pac. 849; *Williams v. New York Cent. R. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651-661; *Stevens v.*

Stevens, 11 Met. (Mass.) 251, 45 Am. Dec. 203; *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69; *Haskell v. Thurston*, 80 Me. 129, 13 Atl. 273; *Mayer v. Coley*, 80 Ga. 207, 7 S. E. 164; *Miller v. Hoeschler*, 121 Wis. 558, 99 N. W. 228; *Oliphant v. Richman*, 67 N. J. Eq. 280, 59 Atl. 241; *Boglino v. Giorgetta*, 20 Colo. App. 338, 78 Pac. 612; *Fox R. F. & P. Co. v. Kelly*, 70 Wis. 287, 35 N. W. 744; *Tipping v. Robbins*, 71 Wis. 507, 37 N. W. 427-429; *Sullivan v. Jones & L. S. Co.*, 208 Pa. St. 540, 57 Atl. 1065-1068, 66 L. R. A. 712; *Evans v. Reading C. & F. Co.*, 160 Pa. St. 209, 28 Atl. 702-707; *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374-377; *Boston etc. R. R. Co. v. Sullivan*, 177 Mass. 200, 83 Am. St. Rep. 275, 58 N. E. 689; *Stovall v. McCutchen*, 107 Ky. 577, 92 Am. St. Rep. 373, 54 S. W. 969, 47 L. R. A. 287; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Lonsdale Co. v. Cook*, 21 R. I. 498, 44 Atl. 929; *Ellis v. Blue Mountain F. Assn.*, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570; *Coatsworth v. Lehigh Valley Ry. Co.*, 156 N. Y. 451, 51 N. E. 301; *Miller v. Wills*, 95 Va. 337, 28 S. E. 337; *Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *King v. Stuart*, 84 Fed. 546.)

The rule announced in *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828, 24 N. E. 686, 8 L. R. A. 578, exactly meets the question involved in the case at bar. The court there held that an injunction would lie, "where the injury resulting from each separate act would be trifling and the damages recoverable therefor scarcely equal to a tithe of the expense necessary to prosecute separate action therefor."

The almost unbroken trend of modern decisions is to hold that the impossibility or impracticability of accurately determining the amount of damages constitutes irreparable injury and is good ground for an injunction. (1 Spelling on Extraordinary Legal Remedies, p. 19, sec. 13; *Gilchrist v. Van Dyke*, 63 Vt. 75, 21 Atl. 1099; *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374-378; *Wilson v. Eagleson*, 9 Idaho, 17, 108 Am. St. Rep. 110, 71 Pac. 613-616.)

An action for damages in the case at bar would not be as adequate, efficient or practical to secure the ends of justice, neither would it be as proper or prompt in its administration. (1 Spelling on Extraordinary Legal Remedies, sec. 16; *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580; *Boyce's Exrs. v. Grundy*, 3 Pet. (U. S.) 210, 7 L. Ed. 655; *Meyer v. Town of Boonville*, 162 Ind. 165, 70 N. E. 146-149; *Stauffer v. Cincinnati etc. R. Co.*, 33 Ind. App. 356, 70 N. E. 543; *Gilcrest Co. v. Des Moines* (Iowa), 102 N. W. 831; *Driscoll v. Smith*, 184 Mass. 221, 68 N. E. 210; *Chappell v. Jasper County Oil etc. Co.*, 31 Ind. App. 170, 66 N. E. 515, 516; *Brooks v. Stroud*, 111 Ga. 875, 36 S. E. 960.)

Equity will enjoin continuous trespass on real estate, even when not destructive of the estate. (*Hall v. Nester*, 122 Mich. 141, 80 N. W. 982; *McClellan v. Taylor* (S. C.), 32 S. E. 527; *Ellis v. Blue Mountain F. Assn.*, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570; *Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176; *Miller v. Mills*, 95 Va. 337, 28 S. E. 337; *Pomeroy's Equity Jurisprudence*, sec. 1357; Spelling on Extraordinary Legal Remedies, sec. 342.) Every common trespass is not ground for an injunction, where it is only contingent and temporary; but where it continues so long as to become a nuisance, injunction will lie. Modern cases in equity extend equitable relief much further than formerly. (*Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Strawberry Valley Cattle Co. v. Chipman*, 13 Utah, 454, 45 Pac. 348.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from an order refusing to dissolve a temporary injunction. The injunction was issued upon the verified complaint without notice. Thereupon the defendants moved for a dissolution, on the ground that the complaint does not state facts sufficient to entitle the plaintiff to an injunction.

Omitting the formal parts thereof, the complaint alleges, in substance, that the plaintiff is now, and for a long time has been, in possession and entitled to the possession of several thousand acres of land (giving a description thereof by number of section, township, and range) in Yellowstone county; that it is the owner of part of these lands in fee and holds others under contract of purchase from the Northern Pacific Railway Company, and still others under leases from the state of Montana, the latter being school lands; that all of said lands are surveyed and are well stocked with native grasses and valuable for grazing livestock; that there are numerous watering places upon certain described portions thereof, created by plaintiff by the digging of wells and the construction of reservoirs and other like devices for storing and holding water; that these lands are useful to plaintiff solely for the purpose of grazing sheep, cattle, horses, and other stock, and constitute in large measure its winter range; that plaintiff requires all of the grasses thereon and all the water at said watering places for the proper care, feeding, and watering of its stock during all the seasons of the year; that none of the said lands, except a small portion thereof, are inclosed; that defendants are engaged as copartners in the business of breeding, raising, buying, and selling sheep, owning large bands of them, which they graze upon the public range in Yellowstone and Fergus counties, holding the same in herd; that, though they and their employees have been and are well acquainted with the boundaries of plaintiff's said lands, they have willfully, deliberately, and intentionally on numerous occasions during the past five years, and do now, hold in herd and graze on the said range of the plaintiff, large bands of sheep, and that said sheep have eaten and consumed, and do now consume, the grasses and verdure thereon and also the water at said watering places, to the great detriment and injury of the plaintiff; that, though frequently during the month of December, 1905, and at many other times, the plaintiff has requested the defendants to desist from so using plaintiff's lands, the defendants have refused to do so, and continue, and

threaten to continue, their trespasses as aforesaid; and that the plaintiff has no plain, speedy, and adequate remedy at law by which it may obtain redress, because many different suits will be required, and the amount of damage so wrought by defendants cannot be estimated in money.

It will be observed that, though it appears that a portion of the lands described are inclosed, no complaint is made that the defendants have in any way broken any inclosure or committed trespasses upon lands within it. The wrong complained of is the continued herding of sheep by defendants upon plaintiff's uninclosed lands, willfully and against plaintiff's protest, whereby the lands are depastured and rendered useless to the plaintiff.

On the argument in this court, counsel for appellants correctly assumed it to be the rule in this jurisdiction that one who knowingly and willfully drives his stock upon lands of another, though uninclosed, is guilty of a trespass and must respond in damages at the suit of the latter. In any event, any doubt on this subject was set at rest by the decision of this court in *Monroe v. Cannon*, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863. In that case, while recognizing the doctrine that the common-law rule that the owner of domestic animals is bound at his peril to keep them within his own inclosure, so that they may not trespass upon his neighbor's, has never been in force in this state, this court held that one who knowingly and willfully permitted his sheep to be herded upon the lands of another, and to depasture the same, must respond in damages to the owner thereof. Indeed, this rule prevails generally throughout the public land states and territories, and has been recognized in the federal courts. (12 Am. & Eng. Ency. of Law, 2d ed., 1045, and collection of cases in note; *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363.)

The only contention made was that a court of equity will in no case assume jurisdiction to enjoin a trespass, unless the title of plaintiff is admitted or clearly established, and the injury

being done or threatened is irreparable because not susceptible of complete pecuniary compensation, and that the allegations of the complaint do not make out such a case. There is no rule better settled than that a court of equity will not interfere to enjoin a trespass when there is an adequate remedy at law. It has been repeatedly recognized and applied by this court. (*Heaney v. Butte & Montana Com. Co.*, 10 Mont. 590, 27 Pac. 379; *King v. Mullins*, 27 Mont. 364, 71 Pac. 155; *Harley v. Montana Ore Pur. Co.*, 27 Mont. 388, 71 Pac. 407.) Though the rule as stated in the case of *Heaney v. Butte & Montana Com. Co.*, founded upon the case of *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484, was afterward modified in *Lee v. Watson*, 15 Mont. 228, 38 Pac. 1077, because, in view of the tendency of the later decisions, it was stated too broadly as applied to the facts presented, that case nevertheless, generally speaking, states the rule correctly. An adequate remedy always exists where the damages can be estimated in money, and the only purpose sought by the action is to determine the amount. If, however, there are peculiar circumstances in the case, as that the trespass is continued or repeated so that its redress would require a multiplicity of suits, or the injury is of such a nature that it cannot be estimated in money, the courts do not hesitate to grant relief by injunction. Such a case was *Sankey v. St. Mary's Female Academy*, 8 Mont. 265, 21 Pac. 23, in which the defendant was enjoined from erecting a fence in an alleyway jointly owned by the plaintiff and defendant and separating their respective premises, so as to close the windows on that side of plaintiff's house, thus excluding light and air. This was a case of continuing trespass involving rights, injury to which could not be estimated in money.

In *Palmer v. Israel*, 13 Mont. 209, 33 Pac. 134, the plaintiff had a contract to pave and curb a portion of Main street in the city of Helena. While engaged in doing so, he was excluded from the street by respondent and others, and thus hindered and delayed in the performance of his contract. The district court on motion dissolved a temporary injunction granted at the

commencement of the action, upon the theory that it had no equitable jurisdiction; but, on appeal of this court, the order of dissolution was reversed. In deciding the case the court quoted with approval from the text of Mr. Pomeroy (Equity Jurisprudence, 2d ed., 1357), as follows: "If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions."

In *Lee v. Watson, supra*, the defendant appeared to have been guilty of repeated trespasses in plowing, seeding, and cultivating land which belonged to the plaintiff and against the warnings and protests of the plaintiff. Plaintiff repeatedly tried to plow and cultivate his land, but was always interfered with by defendant. This was a case of wanton and repeated trespass. While it appeared further that the defendant was insolvent, yet we apprehend that was only an additional fact tending to show irreparable damage, and that the court would have properly issued the injunction if this fact had not appeared, on the theory that the repeated, wanton trespass was sufficient to give the court jurisdiction.

The facts in the complaint here show a case falling clearly within the principle of the cases of *Sankey v. St. Mary's Female Academy*, *Palmer v. Israel*, and *Lee v. Watson, supra*. In each of them the right involved was such that an action for damages would have afforded no adequate remedy, conceding that the damages were susceptible of computation in money. So in the present case. The lands of plaintiff are fit for pasturage only. It would hardly be possible to measure adequately in money the value of the wild grasses grown thereon. They cannot be harvested, and their value thus ascertained. Plaintiff could use them only by having his stock eat them, and their value could only be manifested in the improved condition of its flocks and herds. Nor can the amount of water consumed, or its

value, be estimated. Again, the trespasses are constantly repeated, and though warned to desist, defendants persevere in their wrongdoing. Many suits would, in all probability, be necessary to obtain any sort of redress, even if the injury resulting from each separate invasion of plaintiff's rights could be adequately estimated. The facts also bring it clearly within the principle stated by Mr. Pomeroy in his text quoted above. Especially is this apparent when attention is called to the condition of the record before us. For the defendants do not in any way controvert the plaintiff's title, and, for present purposes, we must assume, cannot do so. They make no objection to the form in which the facts are stated in the complaint, but merely rely upon the general principle that a court of equity will not interfere by injunction to restrain a trespass.

While upon the final hearing upon the merits, after the issues are made up, other questions may arise which will constitute a complete defense to the plaintiff's action, upon the record before us we think the injunction was properly issued, and that the order of the court refusing to dissolve it was correct. It is accordingly affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

BEAVERHEAD CANAL COMPANY, APPELLANT, v. DILLON
ELECTRIC LIGHT & POWER COMPANY ET AL., DE-
FENDANTS. JOHN B. SMITH, RESPONDENT.

34	135
139	391
139	393

(No. 2,240.)

(Submitted April 4, 1906. Decided April 21, 1906.)

*Water Rights—Spring and Seepage Waters—Implied Findings—
Presumptions—Increase of Supply by Artificial Means.*

Trial—Implied Findings—When Proper.

1. Where the district court fails to specifically find upon an issue, raised by an allegation in the answer and a denial thereof in the reply, a finding in consonance with the allegation in the answer will be im-

plied unless such implied finding is inconsistent with any express finding of the court.

Water Rights—Spring and Seepage Waters—Implied and Inconsistent Findings.

2. Where, in a suit to determine water rights, the court expressly found that certain spring and seepage water had its rise in the bed of a creek the waters of which flowed into a river to which it was a tributary, and that the creek water flowed into such river at all times above the head of a certain ditch, a finding that such spring or seepage water would not, if permitted to flow uninterruptedly, reach the head of said ditch, would be inconsistent with the other findings, and may, therefore, not be implied.

Water Rights—Increase by Artificial Means—Presumptions.

3. Where, in a water right suit it did not appear that certain spring or seepage water having its rise in the bed of a creek, was so made to rise by artificial means, and in the absence of a finding to that effect, the presumption will obtain that such water forms a part of the natural supply of the creek.

Water Rights—Increase of Supply—Spring and Seepage Water.

4. The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water or so much thereof as naturally flows in the stream and its tributaries above the head of his ditch, unimpaired and unaffected by any subsequent change wrought by nature, such as spring or seepage water rising in the bed of the stream, extraordinary rain or snowfall and the like.

Water Rights—Increase by Artificial Means—Rights of Prior and Subsequent Appropriators.

5. *Obiter*: A person who by his own exertions and by artificial means increases the flow of water in a stream, has the first right to such increased supply, and as against him a prior appropriator of water on the stream may not claim any interest in the additional water so caused to flow.

Water Rights—Spring and Seepage Waters—Rights of Senior and Junior Appropriators.

6. Where certain spring and seepage waters come to the surface in the bed of a creek, tributary to a river from which a prior appropriation has been made, and during the irrigating season the creek runs dry below the springs and before it reaches the river, the prior appropriator cannot complain if the waters so having their rise in the bed of the creek and which would otherwise be lost, be used by a subsequent appropriator.

Appeal from District Court, Beaverhead County; Lew L. Callaway, Judge.

ACTION by Beaverhead Canal Company against the Dillon Electric Light and Power Company and others. From a judgment in favor of plaintiff for less than the relief demanded, it appeals. Modified and affirmed.

Messrs. Word & Word, and Mr. W. S. Barbour, for Respondent.

Mr. Robert B. Smith, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to have determined the relative rights of the parties to the use of the waters of Beaverhead river and its tributaries. The appellant was plaintiff in the court below. The appeal is from that portion of the decree which awards to John B. Smith, who was one of the defendants, the prior right to the use of two hundred and fifty inches of water.

Appellant is satisfied with the findings of fact returned by the trial court, but the contention is made in this court that the trial court erred in its conclusion of law No. 3, and in entering its decree in accordance with such conclusion. The court found that the plaintiff appropriated four thousand two hundred and fifty-four inches of the waters of Beaverhead river in August, 1883. Findings No. 4 and 5 are as follows:

“(4) That Rattlesnake creek is, and was, at all times herein mentioned a tributary of Beaverhead river, and that the waters thereof flow into the Beaverhead river at all times above the head of plaintiff’s canal; but this finding does not imply that the plaintiff is entitled to the spring or seepage waters rising in the channel of Rattlesnake creek, hereinafter mentioned.

“(5) That beginning with the year 1890, certain seepage or spring waters began to rise in Rattlesnake creek, and have continued to increase from year to year; that during the month of May, 1897, Cox and Pyle, the predecessors in interest of John B. Smith, built a dam across Rattlesnake creek, and by means of said dam and ditch constructed from said Rattlesnake creek, known as and called the ‘Cox and Pyle Ditch,’ diverted from said creek certain springs and seepage waters arising in the bed of said creek on the Perkins and McLaughlin ranches, to the amount of two hundred and fifty inches, and thereby ap-

propriated the same; and the said defendant and his said predecessors have ever since said date made a beneficial use thereof."

The foregoing are all the findings made by the court which affect the rights of either of the parties to this appeal, and from these findings the court drew its conclusions of law Nos. 1 and 3 as follows:

"(1) That the plaintiff is the owner, and entitled to the prior use of four thousand two hundred and fifty-four statutory inches of the waters of Beaverhead river for irrigation, and other useful purposes, as of date August 15, 1883."

"(3) That John B. Smith is now, and he and his grantors and predecessors in interest have been since May, 1897, the owner and owners of, and entitled to the prior use of, two hundred and fifty statutory inches, or six and one-quarter cubic feet, of the waters of certain spring or seepage waters arising in the bed of Rattlesnake creek on the Perkins and McLaughlin ranches, taken thereout and appropriated by means of his certain ditch, known as and called the 'Cox and Pyle Ditch,' tapping said creek, and leading to and upon his lands in the county of Beaverhead and state of Montana, mentioned in his answer on file herein."

In the answer of the defendant Smith it is alleged that the spring or seepage water appropriated by his predecessors in 1897 would not, if permitted to flow uninterruptedly, reach the head of plaintiff's ditch. This allegation is denied in the reply. As the court did not specifically make any finding upon the issue thus raised, it is urged by counsel for respondent that a finding in consonance with the allegation in the answer will be implied, and this is true provided such implied finding is not inconsistent with any express finding of the court. But we are not able to reconcile such an implied finding with findings No. 4 and 5 above.

If the spring or seepage water, the prior right to the use of which defendant Smith makes claim, rises in Rattlesnake creek (finding No. 5), and Rattlesnake creek is a tributary of Beaverhead river, and the waters of Rattlesnake creek "flow into the

Beaverhead river at all times above the head of plaintiff's canal" (finding No. 4), it would be an impossibility to determine that the particular water in Rattlesnake creek which is designated as spring or seepage water would not flow down Rattlesnake creek to the head of plaintiff's canal if permitted to flow without interruption by some artificial means, just as the remaining portion of the water in such creek is determined by the court to do. Therefore we cannot presume that the trial court found in accordance with that theory; but, on the contrary, findings 4 and 5 above are not consistent with any other theory than that the spring or seepage water is a part of the water of Rattlesnake creek which flows "into Beaverhead river at all times above the head of plaintiff's canal." Accepting this latter theory as the only one which the trial court could have acted upon, if finding No. 4 is in accordance with the facts as shown by the evidence, and we must presume that it is, as no one is finding fault with it, and the evidence is not before us, then the court's conclusion of law No. 3 above is erroneous and directly contradictory of conclusion No. 1 above, and the decree is not supported by the findings.

Conclusion No. 1 awards to the plaintiff the prior right to the use of four thousand two hundred and fifty-four inches of water, and conclusion No. 3 awards to defendant Smith the prior right to the use of two hundred and fifty inches. We must assume that the trial court proceeded upon the theory that as this spring or seepage water did not appear, as such at least, in Rattlesnake creek until several years after plaintiff made its appropriation, such spring or seepage water, although it formed a part of the waters of Rattlesnake creek after 1890, and, if unmolested, would flow into Beaverhead river above the head of plaintiff's canal, was nevertheless unaffected by plaintiff's appropriation and open and subject to appropriation by the predecessors of defendant Smith in 1897, and contention is made for this theory by counsel for respondent in their brief. They say: "The rights of appellant were and are limited to the natural condition of Beaverhead river and its tributaries at the

time its appropriation was made, and cannot now be extended so as to include the spring waters in question," and Farnham on Waters and Water Rights, section 672d, is cited in support of their contention. The language of the author, however, we think is not susceptible of the construction given it. It is true this language is used: "The rights of the appropriator are limited to the natural condition of the stream at the time the appropriation is made." But the word "natural" is used here in contradistinction to "artificial." When read with the context we think the author's meaning is made plain. He says: "When an appropriation is made of the water of a stream, the rights of the appropriator are limited to the natural condition of the stream at the time the appropriation is made, and he has no interest in improvements subsequently made which increase the supply of water flowing in it. Therefore, if by his own exertions another increases the available supply of water in the stream, he has a right to appropriate and use it to the extent of the increase. This rule does not apply to mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which would not otherwise have flowed there."

This increased supply of water to which reference is made is that occasioned by artificial means. That this is the author's meaning is made manifest by the reference in support of the text (*Paige v. Rocky Ford Canal etc. Co.*, 83 Cal. 84, 21 Pac. 1102), and when thus understood, the language of the text first quoted above is made plain, viz., that if defendant Smith by his own exertions had increased the supply of water in Rattlesnake creek, he would have the prior right to such increased supply, and, of course, as against him the plaintiff would not have any interest in such water so caused to flow there by artificial means. There is not anything to indicate that this spring or seepage water is caused to rise in Rattlesnake creek by artificial means, and in the absence of a finding to that effect the

presumption is that such waters form a part of the natural supply of such creek.

It is common knowledge that springs form the source of many of these mountain streams, and to hold to the doctrine for which contention is made by respondent would impose upon the prior appropriator the burden of constantly watching the source of his water supply, and in fact make his water right the most unreliable and hazardous species of property imaginable; for, if that doctrine should prevail and the particular springs which gave rise to the stream from which his water supply was obtained should cease to flow, and other springs furnishing a like amount of water should commence to flow into and feed the same stream above the head of his canal, a subsequent appropriator could deprive him of his prior right, merely because in the course of nature water which had formerly come to the surface in one spring had afterward found a new outlet. We are satisfied that such a result was never contemplated.

The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snowfall, or by springs or seepage which directly contribute.

Of course, the court's finding that the waters of Rattlesnake creek flow into Beaverhead river at all times above the head of plaintiff's canal does not establish the fact that they will continue to do so during the irrigation season of every year hereafter; and if it should occur that Rattlesnake creek becomes dry below these springs and above the head of plaintiff's canal, at such times plaintiff could not complain if defendant Smith uses these waters which otherwise would be lost. (*Raymond v. Wimsette*, 12 Mont. 551, 33 Am. St. Rep. 604, 31 Pac. 537.)

The cause is remanded to the district court with directions to modify the decree by striking from the conclusion of law No. 3, copied in the decree, and from paragraph No. 3 of the decretal portion of the decree the word "prior," wherever it occurs in said conclusion of law or paragraph, and by striking out the last sentence in said paragraph No. 3, to wit: "The plaintiff has no right in said spring or seepage waters equal to those of the defendant Smith therein," and inserting in lieu thereof the following: "The right of the plaintiff is prior and superior to that of the defendant John B. Smith, as determined by the dates of their respective appropriations"; and, as so modified, the decree will be affirmed.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

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36	416

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37	484

34	142
39	343

CASE ET AL., RESPONDENTS, v. KRAMER, APPELLANT.

(No. 2,185.)

(Submitted April 11, 1906. Decided April 21, 1906.)

Contracts—Sales—Part Payment—Statute of Frauds—New Trial—Principal and Agent—Appeal.

New Trial—When Order Granting Motion Will be Affirmed.

1. An order granting a motion for a new trial, which does not designate upon which of a number of grounds mentioned in the motion it was made, will be affirmed if justified by any one of them.

New Trial—District Courts—Discretion—Review.

2. For errors at law occurring during the trial prejudicially affecting the rights of the moving party, a new trial may be demanded as a matter of right, and where such errors are made manifest, the district court has no discretion but should grant the motion.

New Trial—Newly Discovered Evidence—Insufficiency of Evidence—District Courts—Discretion.

3. A motion for a new trial on the ground of newly discovered evidence, or insufficiency of the evidence to justify the verdict, is addressed to the discretionary power of the trial court, and its action thereon will not be disturbed on appeal unless it appears that there has been a clear abuse of such power.

New Trial—Conflict in Evidence—Appeal—Affirmance.

4. Where the record on appeal shows that upon every issue presented by the pleadings the evidence introduced involves an irreconcilable conflict, an order granting a new trial will be affirmed.

Contracts of Sale—Part Payment—Effect—Statute of Frauds—Principal and Agent.

5. Defendant in an action for the breach of a written contract had orally instructed his agent to sell a large number of cattle for him and to require payment of part of the purchase price. A purchaser was found, a check for \$5,000 as part payment accepted by the agent and placed to the credit of defendant in bank, and a written agreement entered into between the purchaser and the agent acting for defendant. Defendant thereafter refused to deliver the cattle, claiming that the agent had exceeded his authority, and that the contract was void in that the authority of the agent to make the sale was not in writing. *Held*, that payment of part of the purchase price brought the transaction within the exception provided for in section 3276 of the Code of Civil Procedure and sections 2185 and 2340 of the Civil Code, relative to contracts which must be in writing, and that therefore the provisions of section 3085 of the Civil Code, declaring that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing, has no application and that the contract was valid.

Principal and Agent—Sales—Payment—Checks.

6. While an agent authorized to receive payment of money should accept cash only, yet where one employed to sell cattle accepted as part payment a check payable to the order of the principal, indorsed it for collection and subsequently cashed it and placed the money in bank to the credit of his principal, the latter cannot complain, and it is immaterial that the check, made payable to the principal, had been indorsed in his name for collection by the agent without special authority to that effect, inasmuch as the principal actually received the money.

New Trial—Specifications of Error—Sufficiency—Appeal.

7. Specifications of error, alleged to be insufficient to point out the particulars in which the evidence fails to justify the verdict, which give the defendant notice and advise the court in plain language of the matters that would be urged upon the hearing of a motion for a new trial, will be deemed sufficient.

Appeal from District Court, Dawson County; C. H. Loud, Judge.

ACTION by W. E. Case and another against M. L. Kramer. From an order granting a new trial to plaintiff after verdict and judgment for defendant, he appeals. Affirmed.

Mr. George W. Farr, and Mr. O. F. Goddard, for Appellant.

The contract sued on made by Courtney as an agent for Kramer was in writing. Courtney did not have any written authorization of agency. The value of the property involved in the al-

leged contract is sufficient to bring the contract under the provisions of sections 2185 and 2340 of the Civil Code and section 3276 of the Code of Civil Procedure. The contract was one required to be in writing and the authority of the agent to enter into the contract under section 3085 of the Civil Code was required to be in writing.

Upon the uncontradicted evidence in this case, it is for the court to determine whether there was in fact an agency, either actual or ostensible, and the burden of proof was upon the plaintiffs, the parties affirming the relation, and it is required that the proofs be clear and specific in order to bind the principal. (Am. & Eng. Ency. of Law, 2d ed., 968, cases cited; *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 250, 70 N. E. 709; *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640; *Herbert v. King*, 1 Mont. 482; *Brophy v. Idaho Produce etc. Co.*, 30 Mont. 279, 78 Pac. 493.)

Courtney had no authority, either express or implied, to accept a check as part payment of the purchase price of the cattle in question. "No ruling in law is better established than that, in the absence of express authority otherwise from his principal, the agent cannot bind his principal by accepting payment in any other medium than money. The agent has no implied authority to receive payment in drafts, bills of exchange, or checks." (See statement of rules and authorities cited in 22 American and English Encyclopedia of Law, second edition, 522.) The principal may, it is true, so act that he will be held to have waived objection to such payment or to have ratified the agent's act, and thus be bound thereby. (*Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 730; *Jackson v. National Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81, 20 S. W. 802, 18 L. R. A. 663; Tiedeman on Sales, p. 465, sec. 269. See Civil Code, sec. 3072.) Courtney's authority, being in its nature limited, its scope must not be exceeded, and his authority must be strictly pursued, and if it is not, the principal will not be bound. (Mechem on Agency, sec. 288, and numerous cases there cited; *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466, 23 N. W. 926; *Davis v. Robinson*,

67 Iowa, 355, 25 N. W. 280; *Saginaw etc. Ry. Co. v. Chappell*, 56 Mich. 190, 22 N. W. 278; *Gilbert v. Deishon*, 107 N. Y. 324, 14 N. E. 318.) And an agent is not permitted to depart from the usual manner of effecting what he is employed to effect. (Story on Agency, sec. 60; *Helena Nat. Bank v. Rocky Mountain Teleph. Co.*, 20 Mont. 391, 63 Am. St. Rep. 628, 51 Pac. 829.) It is the duty of a person dealing with an agent to inquire into the nature and extent of his authority and deal with him accordingly, and they deal with him at their peril. (1 Am. & Eng. Ency. of Law, 2d ed., p. 994; *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. 323; *Martin v. Farnsworth*, 49 N. Y. 555.)

And one is not permitted to trust to mere presumption of authority, or to any mere assumption of authority by the agent, and reasonable prudence must be exercised, and if there is anything about the agent's pretension of authority which is unusual or improbable, one should inquire before dealing with an agent. (*Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; Mechem on Agency, secs. 289, 290; *Leu v. Mayer*, 52 Kan. 419, 34 Pac. 969; *Bohart v. Oberne*, 36 Kan. 284, 13 Pac. 388.)

In this there is an important distinction between a general and a special agent. The one dealing with a special agent is held to the strictest inquiry; nothing is to be assumed or presumed. (Parsons on Contracts, 39; *Anderson v. Coonley*, 21 Wend. 279.)

Mr. T. J. Porter, and *Mr. Sydney Sanner*, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover damages for the breach of a written contract, under the terms of which, it is alleged, defendant on November 27, 1899, sold to plaintiffs, as copartners, certain cattle and agreed to deliver them at any time from May 1 to 15, 1900, at a designated place in Dawson county. It is alleged by plaintiffs that they negotiated the contract with defendant through one Courtney, defendant's agent, duly empowered to act in that behalf; that they made a cash payment

of \$5,000 required by its terms, which was received and retained by the defendant; that they were ready and able to make payment of the balance of the purchase price at the time and place of delivery, as well as to comply with all the terms and conditions of the contract to be by them performed; but that defendant failed to perform the contract on his part by refusing to deliver the cattle at the time and place agreed upon, or at all, to the plaintiffs' damage in the sum of \$15,000. A copy of the contract is set forth in the complaint. It recites the different classes of cattle sold and the price per head to be paid for each class, and includes all the cattle bearing the brands of the defendant at the date of its execution, "with the calves thrown in and not to be paid for." The receipt of \$5,000 in cash is acknowledged. The answer is a general denial. A trial upon the issues thus presented resulted in a verdict and judgment for defendant. By a general order the court granted plaintiffs' motion for a new trial. From this order the defendant has appealed.

The grounds of the motion are errors of law in rulings upon the admission and exclusion of evidence, and in instructing the jury, and insufficiency of the evidence to justify the verdict. Since the order does not designate upon which of the grounds mentioned it was made, it must be affirmed if justified by any one of them.

Respondents insist that the granting of a motion for a new trial rests entirely in the discretion of the trial court, and that for that reason the order appealed from should be affirmed. For errors at law prejudicially affecting the rights of the movant, a new trial may be demanded as a matter of right. In such case the court has no discretion, if the error is made manifest. (*State v. Schnepel*, 23 Mont. 523, 58 Pac. 868.) When the ground is newly discovered evidence or insufficiency of the evidence to justify the verdict, the motion is addressed to the discretionary power of the court, and its action in the premises will not be disturbed by the appellate court unless it appears that there has been a clear abuse of this power. (*State v. Schnepel*, *supra*;

In re Colbert's Estate, 31 Mont. 477, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248; *Gillies v. Clarke Fork Coal M. Co.*, 32 Mont. 320, 80 Pac. 370; *Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146; *Harrington v. Butte & Boston M. Co.*, 27 Mont. 1, 69 Pac. 102; *Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714; *State v. Landry*, 29 Mont. 218, 74 Pac. 418.)

An examination of the record reveals the fact that upon every issue presented by the pleadings the evidence introduced at the trial involves an irreconcilable conflict. For this reason alone, we are of the opinion that the order of the district court was properly made.

It appears from the testimony introduced by the plaintiffs that during the latter part of August, 1899, the defendant, being desirous of closing out his cattle interests in Dawson county, went to one William Courtney, a broker in Miles City, Custer county, and listed his stock with him for sale, stating to him the character of the different classes of cattle he had and the prices he asked. He thereupon dictated a circular letter, to be addressed by the broker to various persons who might desire to buy his cattle, stating the terms upon which he wished to sell. Among other things this circular letter stated the number of steers of various ages owned by the defendant, and also of cows and heifers. It also stated that there had been branded the preceding spring one hundred and forty-four calves, that there would probably be branded that fall fifty or sixty more, and that under the terms of the sale the calves would be thrown in. A cash payment of \$5 per head, amounting to \$5,000, was required. The place of delivery designated was Miles City stockyards. He thereupon went to his home, some one hundred and twenty-five miles away, in Dawson county. In the meantime, and prior to November 24th, there was some correspondence between himself and Courtney as to the sale of the cattle; and on or about November 13th Courtney wrote the defendant that he had possibly secured a purchaser for his cattle to be delivered at a designated place in Dawson county on or about May 15th, upon the conditions and at the prices fixed by the defendant.

On November 24th the defendant went to Miles City and saw Courtney. According to Courtney's statement, he was then told by the defendant to close up the sale. On leaving Miles City the defendant met plaintiff Case a short distance from the town, and, in a conversation then had with him with reference to the purchase of the cattle, told him to go to Courtney and buy the cattle. On November 27th, after negotiations between Case and Courtney extending over two or three days, Case bought the cattle at the stipulated price and paid the \$5,000 required by the defendant. This he paid to Courtney by his check, which was afterward deposited by Courtney in one of the banks in Miles City, and paid to the credit of the defendant. The memorandum set forth in the complaint was then drawn by Courtney and signed by the plaintiff Case on behalf of himself and his coplaintiff, and by Courtney for the defendant. Courtney immediately notified the defendant by mail, inclosing a copy of the contract. So the matter stood until about December 29th. The defendant then visited Miles City and called on plaintiff Case. Referring to the contract of sale entered into by Courtney in his behalf, he said to Case that he would not deliver the cattle under the terms of the contract, unless Case and his coplaintiff would pay him an additional \$5 per head for one class of cattle designated in the contract as Colorado cattle. This additional demand amounted to \$1,300. Case refused to make this concession. Thereupon Kramer notified the bank that he would not accept the money and also wrote to plaintiffs that he did not intend to abide by the contract. At the same time he also wrote Courtney saying that he would not ratify the contract and that his reason therefor was that in making it Courtney had not obeyed his instructions. Kramer denied that he had a conversation with Case on November 24th or at any other time, referring him to Courtney. He denied that he ever authorized Courtney to enter into any contract of any character or description for him with reference to the cattle, or to accept any payment for him of a part of the purchase price. He stated that he employed Courtney for the sole purpose of finding him a purchaser with whom he intended to arrange the terms of the sale himself, with-

out the intervention of any agent. It does not appear that Kramer specially authorized Courtney to enter into a written contract, nor that he indicated how the cash payment should be made. Upon these facts we do not think the court abused its discretion in granting the order.

Counsel say, however, that under section 3276 of the Code of Civil Procedure, and sections 2185 and 2340 of the Civil Code, the contract of sale, in order to be valid, must have been in writing and signed by Kramer or his duly authorized agent, and since it does not appear that Courtney's authority was in writing, the contract as made by him was void. In support of this contention they cite also section 3085 of the Civil Code. This section declares: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." The fallacy involved in the contention is the assumption that the contract falls in the class of those that must be evidenced by writing, under the sections of the Civil Code and of the Code of Civil Procedure, *supra*.

Under the instructions given by Kramer to Courtney, a part of the purchase price was to be paid down, and this was done. This brings the agreement clearly within the exception provided for in the sections cited with reference to the sale of chattels. Section 3085, *supra*, therefore has no application. If the contract had been negotiated by Kramer himself and had been oral, the part payment to him would have brought it within the exception. Since this is so, oral authority to Courtney to act for him in the making of the contract was valid; for under section 3085, *supra*, Kramer could orally authorize Courtney to make for him any contract which he himself might make orally. Nor was the relation of the parties or the authority of Courtney changed by the fact that Courtney, doubtless for safety, drew up and signed the memorandum for Kramer. It cast no greater burden upon Kramer than it would had it been left to rest entirely upon oral evidence. If Courtney had authority to act for Kramer, as this evidence tends to show, the latter could not,

after the agreement was made, repudiate it and deny its liability.

Counsel also contend that Courtney had no authority to accept Case's check to meet the cash payment required. If Case's testimony touching his conversation with Kramer on November 24th, in which he was told to go to Courtney to make the purchase, is to be accepted as true—and for present purposes it must be so accepted—Courtney had ostensible authority to negotiate the sale, and in connection therewith to do everything necessary, proper and usual in the ordinary course of business for effecting the purpose of his agency. (Civ. Code, secs. 3093, 3095.) But we are not now called on to inquire whether it is usual or customary in such transactions to make payments in checks. The check given by Case and accepted by Courtney was afterward actually cashed by the drawee, and the amount thereof paid by Courtney to the credit of Kramer. It is the rule that an agent, under his authority to receive payment, may not accept anything but cash. (1 Am. & Eng. Ency. of Law, 2d ed., 1003; Mecaem on Agency, 321.) Yet, if the check received is actually paid by the drawee, this constitutes payment to the principal, even though the agent misappropriates the fund and converts it to his own use. (Mechem on Agency, 382; *Sage v. Burton*, 84 Hun, 267, 32 N. Y. Supp. 1122; *Kansas City etc. R. R. Co. v. Ivy Leaf Coal Co.*, 97 Ala. 705, 12 South. 395; *Harbach v. Colvin*, 73 Iowa, 638, 35 N. W. 663; *Bardwell v. American Express Co.*, 35 Minn. 344, 28 N. W. 925.) Nor is it of importance that the check made payable to the order of Kramer was indorsed in his name for collection by Courtney without special authority. The money went to Kramer's account, and thus he actually received it.

Appellants contend, further, that the specifications are not sufficient to point out the particulars wherein the evidence is alleged to be insufficient to justify the verdict. The objections made to them are general and to the effect that, instead of setting out what the evidence does not show, they urge what the evidence does show. We think, however, that the specifications

are sufficient to give to the defendant notice, and to advise the court in plain language of the matters that would be urged upon the hearing of the motion. Such being the case, the order should not be reversed on the ground of their insufficiency. (*Gillies v. Clarke Fork Coal M. Co.*, *supra*, and cases cited therein.)

Since, for the reasons stated, it was within the sound discretion of the district court to direct a new trial, it is not necessary to discuss the other points presented. The order is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, being disqualified, did not hear the argument and takes no part in the foregoing opinion.

HARDESTY, RESPONDENT, v. LARGEY LUMBER COMPANY, APPELLANT.

(No. 2,246.)

(Submitted April 5, 1906. Decided April 30, 1906.)

Master and Servant—Personal Injuries—Res Ipsa Loquitur—Safe Place to Work—Instructions—Statutory Construction—Nonsuit.

Master and Servant—Personal Injuries—Nonsuit—Negligence—Res Ipsa Loquitur.

1. Where, in an action for personal injuries, the evidence introduced by plaintiff tended to prove that while he was employed as a carpenter in the erection of a building, the master, through its vice-principal, not only had actual charge and control of the piling of certain lumber, through the falling of which plaintiff was injured, but actually directed the manner in which it should be piled and gave directions that particular pains in doing so should not be exercised; that cross-strips or ties should not be employed; that plaintiff was directed by the vice-principal to the very place where he was injured, and where it was self-evident that if properly piled the lumber would not have fallen of its own accord, the doctrine of *res ipsa loquitur* is applicable, so that a *prima facie* case of negligence on the part of defendant was made out, and a motion for nonsuit was therefore properly refused.

Same—Negligence—Burden of Proof—Presumptions.

2. While the general rule of law is that negligence is not inferable from the mere occurrence of an accident, yet where the thing which

34	151
38	76
36	307

34	151
138	165
138	479

34	151
40	9
40	229

causes the injury is shown to be under the management and control of defendant and that the accident is of such a nature as to make it apparent that, but for the failure of those in control to use proper care, it would not have happened, proof of the accident raises a presumption of defendant's negligence and casts upon him the burden of showing that ordinary care was exercised.

Same—Vice-principal—Assumption of Risk—Question for Jury.

3. The question whether the danger from a pile of lumber, by the falling of which plaintiff was injured, was obvious and apparent to him, or equally as apparent to him as to defendant's vice-principal, under whose direction the lumber had been piled and who had directed plaintiff to work at the very place where the accident occurred, by reason of which knowledge plaintiff will be deemed to have assumed the risk incident to his employment, was one for the jury to determine.

Same—Vice-principal—Fellow-servants.

4. *Held*, under *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582, that one who had actual charge and control of the piling of lumber used in the construction of a building for defendant company, and directed the piling to be done in a certain manner, and later ordered plaintiff, who was injured by the falling of such lumber, to work at the place where the accident occurred, was defendant's vice-principal and not a fellow-servant of plaintiff.

Same—Safe Place to Work—When Doctrine not Applicable.

5. The doctrine that, where a servant is creating a place in which to work, the master will not be liable if the former is injured while making such place, is not applicable where plaintiff, a carpenter, was directed to work in a particular place outside of a building in course of construction, and who while executing such order was injured by the falling of improperly piled lumber.

Trial—Instructions—Request to Make More Definite—Appeal.

6. Where appellant failed to request that an instruction be given setting forth fully the issues to be determined in a personal injury case, he may not complain of one which defined them in very general terms.

Trial—Instructions—Commenting on Evidence—Appeal.

7. An instruction commenting on the evidence was properly refused.

ON REHEARING.

Statutory Construction.

8. The arrangement of the Codes into Divisions, Parts, Titles, Chapters, Articles and Sections is one of the instrumentalities by which the Codes may be construed, and the particular title of each of these subdivisions may be considered in determining the meaning of such subdivisions.

Statutory Construction.

9. All sections of a Code upon the same subject matter must be taken as one law and construed together.

Master and Servant—Personal Injuries—Statutes—Instructions.

10. *Held*, that sections 2660, 2661, and 2662 of the Civil Code, each of which refers to the "Obligations of the Employer"—the title of the Article comprising the sections—are directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment; and that instructions given in such an action embodying these sections were properly submitted.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

ACTION by John M. Hardesty against the Largey Lumber Company. Judgment for plaintiff. Defendant appeals from the judgment and an order denying it a new trial. Affirmed.

Messrs. McBride & McBride, for Appellant.

It was not the duty of defendant to use reasonable care to provide plaintiff with a safe place to work, where the prosecution of the work itself, the construction of the mill, made the place, and created its attending dangers. (*Davis v. Trade Dollar C. M. Co.*, 117 Fed. 122, 54 C. C. A. 636; *Shaw v. New Year Gold M. Co.*, 31 Mont. 138, 77 Pac. 515; *O'Connell v. Clark*, 22 App. Div. 466, 48 N. Y. Supp. 74-76; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003.)

Plaintiff, by reason of his employment as a carpenter in the construction of plaintiff's mill, assumed the risks incident to dangers attending the temporary piling of plank, and other lumber intended for use in the construction of said mill. (*Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Dresser on Employers' Liability*, 433-437; *Labatt on Master and Servant*, 645; *Kohn v. McNulta*, 147 U. S. 238, 241, 13 Sup. Ct. 298, 37 L. Ed. 150; *Hull v. Northern Pac. Ry. Co.*, 136 Fed. 153, 156.)

If the method of piling lumber adopted by the defendant, Largey Lumber Company, for use in the construction of its planing-mill was the customary and usual method of piling lumber for immediate use in buildings and constructions in course of erection, then it makes no difference whether or not it would have been safer if the piles of lumber had been stripped. (1 *Labatt on Master and Servant*, 85, and cases cited.)

The burden rests upon plaintiff to prove that the defendant was negligent, and that such negligence was the proximate cause of the injury. Negligence is not presumed, but must be proved. (6 *Thompson on Negligence*, par. 7695, and cases cited.) If the

evidence on behalf of plaintiff shows the injury to have been directly caused (either in whole or in part) by his act, the burden is immediately upon him to prove that he was exercising ordinary care at the time. (*Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Cummings v. Helena etc. Co.*, 26 Mont. 434, 442, 68 Pac. 852.) If the evidence on plaintiff's behalf establishes beyond question that his own omission to use ordinary care contributed to or itself caused the injury, the court should, on motion, direct a verdict, or grant a nonsuit. (*Cummings v. Helena etc. Co.*, *supra*.) The mere fact that the accident happened, and that the injury occurred to plaintiff, raises no presumption whatever of any negligence on the part of the defendant. (*Patton v. Texas etc. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.) Sections 2660, 2661 and 2662 of the Civil Code, substantially given at the request of plaintiff in instructions 3 and 4, are misleading, and given without comment or explanation are erroneous and prejudicial to the rights of the party defendant. The court, in effect, in these two instructions, eliminated from the consideration of the jury any negligence or carelessness on the part of the plaintiff himself. Under these instructions, if the servant in any manner in the course of his employment suffers any loss or damage, even though such loss or damage be the direct result of his own carelessness and negligence, yet the jury are bound to find a verdict for the plaintiff. The instructions are further erroneous for the reason that thereby the court suggests to the jury that in some manner or by some means the employer in the case at bar gave to the servant an unlawful instruction or direction; and that the defendant in this case has been in some manner a violator of the law. The language of the Code is not always a safe and sure means of conveying thought, or of stating the law to a juror. (*State v. Shafer*, 26 Mont. 11, 66 Pac. 463; *State v. Felker*, 27 Mont. 451, 71 Pac. 668.)

Messrs. Mackel & Meyer, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries. The plaintiff had judgment in the district court, and the defendant appeals from the judgment, and from an order denying its motion for a new trial.

The plaintiff was a carpenter employed by the defendant about the construction of a planing-mill in Butte. The defendant had caused large quantities of lumber to be brought from its lumber-yard for use in constructing the building. This lumber had been placed in piles near the building being constructed. The negligence is charged as follows: "That on or about the nineteenth day of November, 1901, in depositing lumber for said construction work, the defendant, in negligent disregard of its duty, through its agents, servants and employees, piled a large quantity of heavy timbers, 2"x10"x20' in size, in so negligent a manner that the pieces in the outside tier or pile of said timbers were laid in one continuous vertical course, one piece upon and above another, to a great height, to wit, the height of about six feet, and said outside tier or pile was in no way tied or bound to the remainder of the said pile, nor in any manner braced or supported to prevent the same from falling, but the same was so negligently piled that it was in such a condition of unstable equilibrium that it required but slight force to overthrow and to cause said outside tier or pile to fall away from the remainder of said pile."

"That defendant knew, or in the exercise of due diligence would have known, of the dangerous condition of said pile, but in negligent disregard of its duty in the premises, it permitted said pile to be and remain in said dangerous and unstable condition, until the twentieth day of November, 1901, when plaintiff, in the course of his said employment, was ordered by said foreman to carry to said mill certain lumber from another pile adjoining the pile last above described, and distant therefrom about four feet; that at said time plaintiff was ignorant of the dangerous, unstable and top-heavy condition of said outside

tier, and of the fact that the same was in no way bound or tied to the remainder of the pile of which it was a part, and while plaintiff was so engaged in carrying lumber from said adjoining pile, and was ignorant of danger as above stated, the said outside tier, without warning to plaintiff and without his fault, toppled over and fell upon plaintiff, and broke and crushed the bones of his leg, ankle and foot, thereby causing plaintiff great physical pain and suffering and permanent injury." The answer denies any negligence on defendant's part, and pleads contributory negligence, negligence of a fellow-servant, and assumption of risk as defenses.

Upon the trial plaintiff offered evidence tending to prove that one Price was vice-principal of defendant in charge of the work of constructing the planing-mill; that plaintiff was injured while obeying specific instructions received from Price; that there were not any cross-strips or ties used in piling the lumber which fell; that it fell without fault of plaintiff; also evidence showing the particular circumstances attending the accident and the extent of plaintiff's injury. Plaintiff then offered the evidence of certain lumber handlers engaged by the defendant at the time of the injury as follows:

Hoover: "If we have a large order, where we have to pile it up high, we use strips, cross-strips, and that binds the whole pile so it won't fall down. * * * There was none of that lumber piled with strips between it. We were told once not to take too much time. Mr. Price told us that. * * * I would put strips on a big load going out. I had to put strips on to bind it. When I had a big pile I put strips on, one on top and one on the bottom. On the small piles I would put on enough to be safe of the strips. * * * The order that Mr. Price gave me was not to take any pains in the piling of it. * * * I believe we put strips on lumber that I hauled to the planing-mill on the first couple of loads that we hauled in there, and continued until Mr. Price came around there and told us not to."

Apperson: "He [Price] told Mr. Raymond and I together to pile the lumber off, any way to get it off. It was not going to

stay there forever. We started to use strips and he stopped us. I did not notice this pile in particular. * * * When we delivered at other places we stripped it but for Price we never did. If a pile was four feet high we would put in a strip."

Plaintiff then rested. Defendant moved for a nonsuit on the following, among other grounds: "For the further reason that it has not been shown, by evidence of any kind or character, that the defendant Largey Lumber Company was at any time guilty of any negligence of any kind or character." This motion was overruled, and defendant introduced evidence in its behalf tending to show that it exercised reasonable care in piling the lumber.

It may be conceded that, unaided by any presumption, the evidence offered by plaintiff is insufficient to charge the defendant with negligence. But counsel for respondent invoke the doctrine of the maxim "*Res ipsa loquitur*," and insist that this case as made by the plaintiff presents an instance wherein the presumption of defendant's negligence arises from the proof of the accident. Of course, the general rule of law is that negligence is not inferable from the mere occurrence of the accident; but to this rule is the well-understood exception that, where the thing which causes the injury is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of ordinary care by the defendant. (1 Shearman & Redfield on Negligence, sec. 59.) Under such circumstances proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised. This rule has been invoked in numerous similar cases. (2 Labatt on Master and Servant, sec. 834; *Solarz v. Manhattan Ry. Co.*, 8 Misc. Rep. 656, 29 N. Y. Supp. 1123; *Green v. Banta*, 48 N. Y. Super. Ct. 156, affirmed on appeal, 97 N. Y. 627; *Guldseth v. Carlin*, 19 App. Div. 588,

46 N. Y. Supp. 357; *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662; *Sackewitz v. American Biscuit Mfg. Co.*, 78 Mo. App. 144; *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565; *Armour v. Golkowska*, 95 Ill. App. 492; *Carroll v. Chicago etc. Ry. Co.*, 99 Wis. 399, 67 Am. St. Rep. 872, 75 N. W. 176; *Winkelmann & Brown Drug Co. v. Colladay*, 88 Md. 78, 40 Atl. 1078; *Westland v. Gold Coin M. Co.*, 101 Fed. 59, 41 C. C. A. 193; 1 Thompson on Negligence, sec. 15.)

For the purpose of the motion it must be conceded that the evidence offered by the plaintiff proved that the defendant, through its vice-principal, Price, not only had actual charge and control of the piling of this lumber, but actually directed the manner in which it should be piled, and gave directions that no particular pains should be exercised and that cross-strips or ties should not be employed. The evidence further shows that the plaintiff was directed by Price to go to the very place where he was injured, and it is self-evident that, if properly piled, the lumber would not have fallen of its own accord.

We think the doctrine of the maxim "*Res ipsa loquitur*" is applicable to the facts of this case, and that the evidence offered by the plaintiff, aided by the presumption which this doctrine raises, made out a *prima facie* case to go to the jury, and the motion for nonsuit was properly denied. We do not think there is any merit in the other grounds of the motion.

But it is said that the danger to plaintiff from this pile of lumber was obvious and apparent, and that the plaintiff assumed the risk. Whether it was apparent to him or equally as apparent to him as to Price, under the facts of this case, were questions for the jury. This subject has been before this court so recently, and so carefully considered, that a reference to the case is sufficient to dispose of the contention now. (*McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701.)

In *Carlson v. Northwestern Tel. Exch. Co.*, 63 Minn. 428, 65 N. W. 914, it is said: "Where a large number of men are employed upon the same work, it is essential that reasonable orders regulating their conduct and assigning to them proper places in

which to work, should be given. It is the duty and the right of the master to give orders and direct the places where his servants shall work. Their duty is instant and absolute obedience, unless it be obvious to them that such obedience will expose them to unusual dangers. Dispatch, discipline and the safety of person and property in the execution of work imperatively require that the master should order and the servant obey. It would be practically impossible to carry on a work of any magnitude on any other basis. A workman, when ordered from one part of the work to another, cannot be allowed to stop, examine and experiment for himself, in order to ascertain if the place assigned to him is a safe one."

There is some contention that Price was a fellow-servant with Hardesty; but under either rule announced by this court in *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582, for determining this question, we think Price was clearly shown to be a vice-principal.

Objection is made to the court's giving an instruction numbered 8, relative to the duty of the master to exercise ordinary care to provide for his servant a reasonably safe place in which to work. We do not approve of the language employed in this instruction, but this is not the objection urged by the appellant. Its criticism is that an instruction on the subject was inapplicable in this case, for the reason that the plaintiff was engaged in making a place in which to work, and *Shaw v. New Year Gold Min. Co.*, 31 Mont. 138, 77 Pac. 515, is cited in support of this plea. But the doctrine of that case we think is not applicable here. This plaintiff was directed by the defendant to work in a particular place outside of the building, and while executing such order was injured. The work of framing timbers and placing them in a building is not analogous to the work of extending a tunnel.

Instruction No. 1 is criticised, because it does not fully set forth the issues to be determined. The court was only attempting to define the issue in very general terms, and in any event

appellant did not request an instruction setting forth the issues more fully.

There is some criticism made of instruction No. 7, but that instruction only attempted to limit plaintiff's recovery to the amount claimed in his complaint.

Instructions 3, 4 and 5 state the rules of law as announced in sections 2660, 2661 and 2662 of the Civil Code.

Errors are also assigned upon the refusal of the court to give certain instructions requested by the defendant. No. 18 comments upon the evidence and would have been erroneous if given. Nos. 19 and 29 were properly refused. The rule announced in the *Carlson Case* above disposes of this contention. Nos. 22 and 23 are directly opposed to the doctrine announced by this court in the *Allen-Bell* and *McCabe Cases*, respectively, and No. 24 is fully covered by instructions 11, 12, 14 and 15, given by the court.

While the cross-examination of the witness Haines was probably with respect to an immaterial matter, it seems impossible that any injury could have resulted to defendant. We have examined the other assignments, but think they are without merit. The case seems to have been fairly submitted to the jury, and its verdict should not be disturbed.

The judgment and order denying defendant a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

ON REHEARING.

(Submitted June 12, 1906. Decided June 22, 1906.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

After the opinion in this case was delivered, appellant filed a motion for a rehearing, in support of which it was earnestly urged that this court had not considered sufficiently its objections to three instructions given by the trial court embodying

the provisions of sections 2660, 2661 and 2662 of the Civil Code. On account of the importance of the question presented, a rehearing was ordered with respect to the matter particularly urged. The order granting the rehearing limited further argument to the question: Are sections 2660 and 2661 of the Civil Code applicable to a personal injury case? And incidentally we asked for a history of those sections and the construction given like provisions prior to their adoption in this state.

In 1871 the Territory of Dakota adopted a Civil Code embodying the provisions of our sections 2660, 2661 and 2662, and also adding to the section corresponding to our section 2661 the following: "Nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." (General Laws, Dakota Territory, 1870-71, secs. 1005, 1006 and 1007.) These sections were continued in force and brought into the Revised Code of 1877 as sections 1129, 1130 and 1131 of the Civil Code, and into the Compiled Laws of 1887 as sections 3752, 3753 and 3754 of the Civil Code. Upon the admission of the states of North Dakota and South Dakota, the same provisions were continued in force in each state and are to be found in the Revised Codes of North Dakota of 1899, as sections 4095, 4096 and 4097, and in the Revised Code of South Dakota of 1903, as sections 1448, 1449 and 1450.

In 1872 the state of California adopted a Civil Code containing the same provisions as the Civil Code of Dakota Territory, as sections 1969, 1970 and 1971. The same provisions are found in the California Civil Code of 1897, and in Kerr's Cyclopedic Codes of 1905, the sections being numbered the same as in the Civil Code of 1872.

These provisions first appear in our Civil Code of 1895. We are unable to state whether our Code provisions were taken from the Code of California or from the Code of one of the Dakotas; and we are further unable to know why our Code omits the portion from section 2661 which is found in the correspond-

ing section of the Civil Codes of California and of North Dakota and South Dakota; but we deem these matters wholly immaterial to the question now presented.

It is worthy of note, in passing, that the arrangement of the respective Codes of all these states is precisely the same. Thus, the Civil Code contains four Divisions, and the arrangement, with the titles directly leading to the particular sections under consideration, is as follows:

Division III, "Obligations."

Part IV of Division III, "Obligations Arising from Particular Transactions."

Title VI of Part IV, "Service."

Chapter I, of Title VI, "Service with Employment."

Article II, of Chapter I, "Obligations of Employer."

This division of the Code into Divisions, Parts, Titles, Chapters, Articles and Sections is one of the instrumentalities by which the Code may be construed, and the particular title of each of these subdivisions, which was arranged in the bill and adopted as a part of the Code itself, may be referred to and considered in determining the meaning of such subdivision. (2 Lewis' Sutherland's Statutory Construction, sec. 362, and cases cited.) It is an elementary principle of statutory construction that all sections upon the same subject matter are to be taken as one law and construed together. (*O'Neal v. Robinson*, 45 Ala. 526.)

Sections 2660, 2661, and 2662, above, and the corresponding sections of the Codes of California and North Dakota and South Dakota, respectively, comprise all of Article II, Chapter I, Title VI, Part IV, Division III, and this Article has to do generally with the "Obligations of the Employer." That is the one subject treated, and each of these three sections refers to the same matter. Furthermore, as if to emphasize this, section 2660 specifically refers to 2661. The Code establishes the law of this state so far as it attempts to announce the law. It is supplemented by the common law of England. (Civ. Code, sec. 4651.)

Appellant does not contend that section 2662, above, is not applicable to an action for damages for personal injuries; and, whether admitted or not, it must be perfectly apparent that section 2661 is applicable, and that it merely states in general terms the common-law defense of assumption of risk. It is also apparent that the corresponding section of the Codes of California, North Dakota and South Dakota, respectively, in addition states the rules applicable to the defense of negligence of a fellow-servant. The omission of this last rule from our section 2661 is of no consequence. Our section states the rule of law applicable to the particular subject treated. Not a single instance is referred to by appellant where these sections, or any of them, have been applied to any other subject, while the cases holding that the rules announced in sections 2661 and 2662, above, are directly applicable to cases arising between servant and master for damages for personal injuries, are numerous.

In the following cases the Dakota Codes referred to are considered: *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38, 13 N. W. 349, s. c. on appeal, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Elliott v. Chicago etc. R. Co.*, 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363. In *Ell v. Northern Pac. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621, 48 N. W. 222, 12 L. R. A. 97, it is said: "We have assumed that our statutes on this question [Comp. Laws, sec. 3753] are only declaratory of the common law. But we do not decide whether they limit the liability of a master. They certainly impose upon him no greater responsibility than the common law, and, as the question of their restrictive force has not been discussed, we do not decide it." (*Gates v. Chicago etc. R. Co.*, 2 S. Dak. 422, 50 N. W. 907, 4 S. Dak. 433, 57 N. W. 200; *McKeever v. Homestake M. Co.*, 10 S. Dak. 599, 74 N. W. 1053; *Northern Pac. R. Co. v. Hogan*, 63 Fed. 102, 11 C. C. A. 51; *Northern Pac. Ry. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009.)

In the following cases the sections of the California Code are considered: *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue*

P. M. M. Co., 51 Cal. 255; *McDonald v. Hazeltine*, 53 Cal. 35; *Beeson v. Green Mt. G. M. Co.*, 57 Cal. 20; *Kevern v. Providence G. & S. M. Min. Co.*, 70 Cal. 392, 11 Pac. 740; *Brown v. Central Pac. R. Co.*, 72 Cal. 523, 14 Pac. 38; *Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378; *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360, 26 Pac. 175; *Trewatha v. Buchanan Gold Min. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. 170; *Mann v. O'Sullivan*, 126 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375; *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519; *Gribben v. Yellow Aster M. & M. Co.*, 142 Cal. 248, 75 Pac. 839.

It is also worthy of note that the term "indemnify" is used in each of the three sections above in the same relation and with the same evident meaning in each instance. In sections 2661 and 2662 the term "losses" is used, while in section 2660 the same thing is expressed by the use of the phrase "all that he necessarily * * * loses." In *Brown v. Central Pac. R. Co.*, 68 Cal. 171, 7 Pac. 447, s. c. in bank, 8 Pac. 828, decided in 1885, ten years before the adoption of our Civil Code, it was held that the provisions of section 1969 of the California Civil Code (our section 2660 above) were directly applicable to that particular case, which was one for damages for personal injuries between servant and master. We are unable to agree with counsel for appellant that the reference to section 1969 is *dictum*.

While in the former opinion in this case we merely approved without comment the instructions given, which announced the law as embodied in sections 2660, 2661, and 2662, we are now, after further argument and consideration, more fully convinced that the instructions were properly submitted in this case, and that the rules announced in those sections are directly applicable to an action of this character. The mere fact that the law as declared in section 2660 may possibly be applicable to a case of another character does not detract from its ap-

plicability here. We are fully satisfied with the disposition made of this case.

The judgment and order denying the defendant a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

MORSE, APPELLANT, v. JACKY ET AL., RESPONDENTS.

(No. 2,244.)

(Submitted April 4, 1906. Decided April 30, 1906.)

Free County High Schools—Board of Trustees—Taxation—Injunctions—County Commissioners.

Free County High Schools—Trustees—Taxation—Injunction.

1. The complaint in an action by a taxpayer to enjoin the trustees of a free county high school—claimed to have been established contrary to law (Laws 1899, p. 59; Laws 1901, p. 6)—from presenting to the board of county commissioners an estimate of the tax rate required to raise the funds necessary for buildings, teachers and necessary apparatus, alleged that if permitted to certify such rate to the board of commissioners it would levy the same on all taxable property in the county which in effect would constitute a lien on such property, including plaintiff's. *Held*, that a general demurrer was properly sustained in that it did not appear that the plaintiff was suffering or was about to suffer any injury for which he had not an adequate remedy; that the action was prematurely brought, inasmuch as the commissioners had not assumed to levy the tax, and that if they should proceed to act, plaintiff would have a remedy by appeal to the district court.

Same—Board of Trustees—Not Part of Taxing Power.

2. The board of trustees of a free county high school (Laws 1899, p. 59; Laws 1901, p. 6), required by law to certify to the board of county commissioners an estimate of the tax rate necessary to raise the funds for the establishment thereof, is not by such requirement made a part of the taxing power.

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

ACTION by George W. Morse against Valentine Jacky and others. From a judgment for defendants, plaintiff appeals.
Affirmed.

Messrs. Rodgers & Rodgers, for Appellant.

Mr. D. M. Durfee, and *Mr. George A. Maywood*, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff, an elector and taxpayer upon real and personal property in Granite county, brought this action against the defendants to enjoin them from acting as trustees of the free county high school at Philipsburg, Granite county, from entering into any contracts in relation to the same, or from performing any other acts as trustees, and to declare the election by which it is claimed by them that such high school was established, null and void. The election was held under the provisions of sections 2 and 3 of an Act of the legislature approved March 3, 1899 (Laws 1899, p. 59), as amended by an Act approved March 14, 1901 (Laws 1901, p. 6).

The complaint sets forth in detail the history and method of conducting the election, the appointment of the defendants as trustees, and the steps taken by them as a board to establish and conduct the school pursuant to their appointment. Upon the facts stated, it is contended that the election was void and ineffective to establish a free county high school, and hence that the defendants are proceeding without right or authority, in that the legislation contains so many inconsistent and conflicting provisions that its intention cannot be discerned, or, if so, that no adequate means are provided for its execution; in that, if it can be executed, the board of county commissioners failed to give the required notice of the election in the manner provided; in that it failed to give notice of the presentation of petitions for the establishment of the school at Philipsburg, so that the electors of any other town or village in the county might have an opportunity to name their own town or village as a candidate; and in that women were permitted to vote in such numbers as to affect the result of the election. Inci-

dentially, the further contention is made that in any event, since the defendants were appointed by the board of commissioners instead of by the county superintendent of schools, in whom alone is vested the power of appointment, they have no power to act. Finally it is argued that the legislation is open to constitutional objection, because under its provisions the electors cannot give a free and fair expression of their wishes at the ballot-box.

The matter specially alleged as justifying the issuance of an injunction is that the defendants, assuming to be a legal board, are proceeding to enter into a contract with the board of school trustees of District No. 1 at Philipsburg, to secure certain rooms and buildings for the use of the school at an annual rental of \$1,025, to employ a principal at an annual salary of \$1,500, to secure furniture and apparatus by the expenditure of considerable sums of money, to employ teachers at annual salaries of \$900 each, and having made an estimate of the amount of funds needed for these purposes and for contingent expenses, they are about to present to the board of commissioners of the county an estimate of the tax rate required to raise the necessary amount; and it is averred that if they are permitted to certify this estimated rate to the board of commissioners, said board will levy the same upon all the taxable property in the county, and this levy will be in effect a judgment against the plaintiff and a lien upon all his real estate in the county. The district court sustained a general demurrer to the complaint. Plaintiff having declined to amend, judgment was entered for the defendants. The appeal is from the judgment. The question submitted is whether a case is stated for injunction.

For the purposes of this review it may be conceded that the election was void for any or all reasons alleged, and that the defendants are proceeding without legal authority; nevertheless we do not think the plaintiff shows himself entitled to the relief demanded. The theory upon which he proceeds is that if the board of trustees certifies the rate estimated to be nec-

essary to raise the amount of funds needed for the purposes of the school, the board of commissioners will certainly levy it, and he will be injured by having a lien upon his property. His notion is that the board of trustees constitutes a part of the taxing power, and that to enjoin it from making and certifying its estimate to the board of commissioners will effectively relieve him from the threatened injury. He invokes the rule, recognized and applied by this court in *Hensley v. City of Butte*, 33 Mont. 206, 83 Pac. 481, that where a special assessment for municipal purposes is void because the city council has proceeded to levy the same in contravention of the statute and there is no other adequate remedy, the collection of it will be enjoined. The rule has no application to the situation presented in this case.

The board of trustees is no part of the taxing power. Its office under the statute (Act of 1899, p. 61, sec. 7; Act of 1901, p. 8, sec. 6) is only to furnish an estimated rate. The board of commissioners levies the tax, and it may or may not proceed to levy the rate certified to it, according as it may be advised touching the legality of the tax. It is not a party to this action. Any injunction issued in this case will not control or affect its action. If, as plaintiff insists, the defendants are acting without authority of law, their action is simply void. No matter what they do, they do not trespass upon any right of the plaintiff. The liabilities contracted by them are personal, and do not bind the county or the board of county commissioners. If the board assumes to pay them, there is a remedy by appeal to the district court, whereupon the authority of the board of trustees to incur the liabilities can be tested and the legality of its acts determined. It will be time enough for the plaintiff to complain when the board of commissioners assumes to make the levy and the treasurer undertakes to force collection of the tax so levied, or when the liabilities contracted by them are recognized as a charge against the county. In our opinion this action is premature, in that it does not appear

that the plaintiff is suffering or is about to suffer, any injury for which he has not adequate remedy.

Counsel cite, also, *Foster v. Coleman & Alexander*, 10 Cal. 279, *Andrews v. Pratt*, 44 Cal. 309, *Schumacker v. Toberman*, 56 Cal. 508, and *Doan v. Board of Co. Commrs. of Logan County*, 3 Idaho, 38, 26 Pac. 167. An examination of these cases shows that the principle applied in them has no application to the facts of this case. In each of them it was sought to annul or enjoin the action of the local municipal board, where it was undertaking to proceed without authority or in violation of law, the result of its action being a distinct trespass upon the rights of plaintiffs. As we have said, it does not appear that the plaintiff here is, or will be, directly affected by any action taken by the alleged board of trustees of the school. The demurrer was properly sustained.

The judgment is affirmed, with costs.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

GRINDROD, RESPONDENT, v. ANGLO-AMERICAN BOND
COMPANY, APPELLANT.

34	169
37	538

(No. 2,247.)

(Submitted April 6, 1906. Decided April 30, 1906.)

Contracts—Fraud—Rescission—Evidence—Estoppel.

Contracts—Fraud—False Representations—Evidence—Sufficiency.

1. Evidence examined, and *held* insufficient to show that the purchase of certain bonds by plaintiff was induced by false statements on defendant's part contained in certain circulars.

Contracts—Rescission—Estoppel.

2. Where certain bonds purchased by plaintiff specifically provided that the entire contract was therein set forth; that no one had authority to alter, change or modify the same in any manner; and that defendant company issuing the bonds was not to be bound by any statement, promise or agreement not therein contained, made by any person—

plaintiff, by retaining the bonds, making monthly payments thereon for more than a year after the date of their receipt, and further obtaining permission from defendant to act as its agent in the same capacity as that in which another agent was acting at the time plaintiff entered into the contract, was thereby estopped from rescinding the contract on the ground that he was misled to his prejudice by any representations made by such other agent or by any circular given him by the latter or mailed to him by the company before or after receiving the bonds.

Contracts—Rescission—Fraud—Reliance on Representations.

3. Where it appears that plaintiff in an action to rescind a contract, into which he alleged he was induced to enter by false and fraudulent representations made to him by defendant, had investigated for himself or had the means at hand to ascertain the truth or falsity of any representations made to him, his reliance upon such representations, however false they may have been, affords no ground of complaint.

Contracts—Breach—Evidence—Sufficiency.

4. Evidence examined, and *held* insufficient to sustain a cause of action for the breach of the conditions of a contract for the purchase of certain cumulative bonds.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Edward Grindrod against the Anglo-American Bond Company. Judgment for plaintiff, and defendant appeals. Reversed.

Mr. H. S. Hepner, Mr. T. J. Walsh, and Mr. Eugene B. Hoffman, for Appellant.

Where the party claiming to have been deceived investigates for himself, or the means are at hand to ascertain the truth or falsity of the representations, reliance upon the representations, however false they may be, affords no ground for action. (*Slaughter v. Gerson*, 13 Wall. 379, 20 L. Ed. 627, cited and approved by this court in *Pierce v. Ten Eyck*, 9 Mont. 353, 23 Pac. 423; *Osborne v. Missouri Pac. Ry.* (Neb.), 98 N. W. 685; *Brown v. Smith*, 109 Fed. 31; *Andrus v. St. Louis etc. Co.*, 130 U. S. 643, 9 Sup. Ct. 645, 32 L. Ed. 1054; *New York Cent. etc. R. R. Co. v. Difendaffer*, 125 Fed. 896; *Cagney v. Cuson*, 77 Ind. 494; *Anderson etc. Works v. Meyer*, 15 Ind. App. 385, 44 N. E. 193; *Mosher v. Post*, 89 Wis. 602, 62 N. W. 516; *Salem India Rubber Co. v. Adams*, 23 Pick. (40 Mass.) 256; *Farnsworth v. Duffner*, 142 U. S. 48, 12 Sup. Ct. 164, 35 L. Ed.

933; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246.)

Mere expressions of opinion or promises are not grounds for rescission. (*Market v. Mondy*, 11 Neb. 213, 7 N. W. 853; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161; *Welshbillig v. Dienhart*, 65 Ind. 941; *Hubbard v. Long* (Mich.), 60 N. W. 50.)

The case made out by the complaint is analogous to an application for an insurance policy. The agent may puff it and misrepresent it, and relying upon those misrepresentations, I make application for it. The policy comes, it does not correspond to the agent's statement, but I accept it and perform my part for a few years and then seek to rescind. In such a case neither equity nor law will give any relief. The cases of *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246, 67 L. R. A. 705, *New York Ins. Co. v. McMasters*, 87 Fed. 63, 30 C. C. A. 532, and *McMasters v. New York Life Ins. Co.*, 99 Fed. 856, 40 C. C. A. 119, fully discuss the law involved here. (See, also, *Oppenheimer v. Clunie*, 142 Cal. 318, 75 Pac. 901; *American Harrow Co. v. Martin*, 18 Ky. Law Rep. 432, 36 S. W. 178; *Doane v. Dunham*, 79 Ill. 131; *Berman v. Woods*, 38 Ark. 351; *Tarkington v. Purvis*, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607, and cases cited in note, p. 609.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover from defendant certain sums of money with interest thereon from September 12, 1904, amounting in the aggregate to \$1,750, which the plaintiff alleges he paid to defendant under contracts into which he was induced to enter by false and fraudulent representations made by defendant.

The complaint contains two causes of action. Omitting the formal parts, the first of these alleges, in substance, that on May 12, 1903, plaintiff and defendant, a corporation organized under the laws of California and doing business in California and

also in Montana, entered into a contract whereby the plaintiff became the purchaser from defendant of two cumulative cash bonds, numbered 676 and 677. That the plaintiff was induced to enter into said contract by reason of certain false and fraudulent representations made by defendant contained in printed circulars issued by and under the authority of the defendant, and accepted and acted upon as true by the plaintiff, as follows: (1) That in said circulars defendant represented to plaintiff that bondholders could surrender their bonds at any transition period and receive the amount paid to date into the maturity fund, plus interest at six per cent per annum, which representation was false and fraudulent and made for the purpose of defrauding plaintiff; (2) that in said circulars defendant represented to plaintiff that bondholders could at any time, when they could not continue their payments under the terms of the bonds, have the amount paid by them into the maturity fund returned to them, with six per cent interest per annum, which representation was false and made for the purpose of defrauding the plaintiff. That plaintiff, relying upon said representations, purchased said bonds and paid to the defendant at different times sums aggregating \$310. That on or about August 1, 1904, plaintiff made demand of the defendant at its home office at San Francisco, California, that it return to him the amount paid as aforesaid, but that it refused and still refuses to do so. That in said bonds it is provided that they shall mature in classes A, B, C, D, and E, and that bondholders should have the privilege of withdrawing in any of said classes, but that said defendant, without the knowledge and consent of plaintiff and against his express wish and instructions, progressed said bonds from class A through intermediate classes into class E, and would not permit plaintiff to withdraw in any of said classes, and has declared said bonds forfeited because plaintiff has failed to pay the assessment in class E; that the maturity fund is created from the sale of bonds of the defendant, and the maturity fund to mature bonds sold in Montana is dependent upon the receipts from the

sale of bonds within the state of Montana, and that defendant, after the sale of said bonds to plaintiff, discontinued sales in Montana, thereby making impossible the maturity of the bonds sold to plaintiff, thus defrauding plaintiff; and that plaintiff has fully performed all the conditions in said contract to be kept and performed by him.

The following is a copy of one of the bonds which is made a part of the complaint, with the attached privileges, requirements, and conditions, so far as the same are pertinent to the present inquiry, those not set forth having reference only to the loan feature of the contract:

“\$1,000.00

\$1,000.00

“Anglo-American Bond Company,

“San Francisco, California.

“Cumulative Cash Bond.

“In consideration of the application for this bond and contract and of the sum of \$5.00, received with said application as a registration fee, and in consideration of the payments here-in to be made and of the agreements to be kept and performed and in further consideration of the benefits flowing from the requirements, privileges and conditions printed on the back hereof, the Anglo-American Bond Company promises to pay Edward Grindrod of the city of Helena, state of Montana, one thousand dollars in gold coin, upon the maturity and completion of this bond and contract in accordance with the privileges, requirements and conditions printed on the back hereof which are hereby made a part of this bond and contract as fully as if they were cited at length over the company's signature. In witness whereof, the Anglo-American Bond Company has executed this bond in the city of San Francisco, California, this twentieth day of July, 1903.

“Anglo-American Bond Company.

“C. O'Brien, Manager.

“[Seal of the Anglo-American Bond Company.]

“Countersigned: H. L. Paddock, Auditor.

“Privileges.

“(2) This bond shall mature and be payable when there has accumulated in the maturity fund of this and similar bonds the sum of one thousand dollars, provided that all similar bonds of prior date have been matured and paid.

“(3) This bond may be surrendered at any maturity period. If the bondholder shall surrender this bond, the company shall, upon thirty days' notice in writing, pay said bondholder a sum equal to the aggregate amount the said bondholder shall have paid into the maturity fund plus interest at six (6) per cent per annum, as rapidly as accumulated in the maturity fund.

“Requirements and Conditions.

“(1) The benefits accruing to the owners of this and similar cumulative bonds shall be governed by the date of their original issuance, and the priority of said date shall determine maturity and order of payment.

“(2) Time is the essence of this agreement. All payments hereunder are due and payable on the first day of each and every month and delinquent on the fifteenth thereof.

“(3) Failure to pay any monthly payments on or before the fifteenth day shall render this bond null and void and all payments previously made shall be forfeited and shall revert to the company.

“(4) Monthly payments on this bond shall be: Class A, one dollar; class B, four (\$4.00) dollars; class C, seven (\$7.00) dollars; class D, nine (\$9.00) dollars; class E, ten (\$10.00) dollars, and after maturity eleven (\$11.00) dollars, subject to the following deductions monthly for the profit and emolument of the company: Class A, twenty cents; class B, fifty cents; class C, one dollar; class D, five dollars, and after maturity, one dollar; but no deductions shall be made from payments to class E. After maturity the bondholder shall pay, on or before the fifteenth day of January and July of each year a fee of \$10.00 or \$20.00 per annum, which shall go to the

maturity fund for the benefit of unmatured bonds until the obligations of the bondholder are fully discharged.

“(5) Upon maturity of this bond, the company shall notify the registered owner and payments of eleven dollars per month shall then begin and continue until all the obligations of the bondholder to the company are discharged. After said notice of maturity, the bondholder shall forthwith receive a loan of one thousand dollars in gold coin, on furnishing security satisfactory to the company. Said loan shall be subject to a charge of ten dollars.”

“(10) Failure to pay the sum of eleven dollars on the first day of any month or before the fifteenth day thereof shall render this bond null and void and the company may proceed to foreclose its mortgage and sell and dispose of the security thereunder without notice to the bondholder.”

“(16) The agreement between the company and the bondholder is fully set forth herein and no one has authority to alter, change or modify this bond in any manner, and any statement, promise or agreement made by any person not contained herein shall not be binding on the company or the bondholder.”

“(17) When the bondholder has been notified that his bond has progressed from one class to a higher class, he shall send his bond to the company to have the transfer to new class indorsed thereon, but no charge shall be made for such indorsement.”

The second cause of action is identical with the first, except that its purpose is to recover the sum of \$1,440, paid in like manner on bonds numbered 804 to 823, inclusive, obtained subsequent to those made the basis of the first cause of action, and with like privileges, requirements and conditions.

The answer is a general denial. Upon the issues thus presented the cause was tried. Defendant's motion for a nonsuit having been denied, and no proof being offered by it, the court directed a verdict and judgment for plaintiff for the amount demanded, with interest. Defendant has appealed.

The first assignment is that the court erred in overruling the motion for nonsuit. The grounds of the motion were: (1) That there was no evidence tending to show any false or fraudulent representations whereby plaintiff was induced to enter into the contract; (2) that the evidence shows that the plaintiff failed to comply with the terms of the contract on his part upon which he seeks to recover; and (3) that there is no evidence tending to show that the defendant ever demanded settlements at the maturity or transition periods provided for in the contract or any of them, or that the bonds were advanced from class to class and finally into class E without the plaintiff's consent, or that he was denied the right to withdraw at any maturity period, or that the defendant ever discontinued sales in the state of Montana, thereby rendering the maturity of plaintiff's bonds impossible.

From a cursory examination of the complaint, it is apparent that plaintiff seeks to recover on one or the other of two theories, which are entirely inconsistent. The first of these proceeds upon the notion that the contract is void by reason of false and fraudulent representations of material matters upon which plaintiff relied, and by which he was induced to enter into it. The second alleges two distinct breaches of the contract: First, in the advancement of the bonds into class E without plaintiff's consent, a refusal to permit plaintiff to withdraw at any maturity period, and a forfeiture for failure to make the payments required after advancement to class E; and, second, in that the maturity of the bonds sold in the state of Montana depended upon the sales made in Montana exclusively, and that defendant ceased to sell bonds in Montana after the purchase by the plaintiff, thus rendering impossible for plaintiff's bonds to mature at any time.

It is not necessary to analyze the investment scheme conducted by the defendant corporation or to discuss at length the character of the contracts made with the bondholders. It is sufficient to say that the plan contemplated the advancement of the bonds successively from class A to class E as fast as they

matured, upon notice to the stockholder, who at each advancement had the option to withdraw, until advancement to class E. After this occurred the right of withdrawal ceased until final maturity in this class. This is clearly expressed in the contract. The power to forfeit for failure to make the monthly payments in each class, and until final maturity in class E, was vested in the defendant.

Treating the complaint as stating a cause of action for a rescission of the contract for fraud and misrepresentation and to recover back the money paid under it, there is no evidence before us to sustain its allegations or to justify the verdict. The only evidence offered was a copy of a circular sent to plaintiff after the contract was made. Plaintiff stated in his evidence that he relied upon the statements contained in a circular given him by one Henry, an agent of defendant, who induced him to enter into the contract. It nowhere appears, however, that the two circulars contained the same statements. Assuming this to be the fact, the circular introduced in evidence contains no false statement as to the nature or terms of the contract. The portions of it which are pertinent here are the following:

"Bonds can be surrendered for face value, and loans repaid in small monthly installments of \$11 per month per \$1,000 and 2 per ct. per annum.

"Before surrender monthly dues are \$1.00, \$4.00, \$7.00, \$9.00, \$10.00 in the different classes.

"Loans made on any kind of approved security. Withdrawals and 6 per cent at any transition period. Company disclaims responsibility for misstatements of agents. Read your bond carefully.

"Withdrawal Privileges.

"Bondholders can surrender their bonds at any transition period and receive amount paid to date into maturity fund plus interest at 6 per cent per annum. This is most important

privilege and prevents loss in case of illness or loss of employment.

“Advantages.

“Payments on the cumulative cash bonds are \$1.00 per month to begin. This is in class A. The bondholder is notified when the profits in this class entitle him to pass to class B, and commencing the following month his payments are \$4.00 per month. From class B he passes to class C, and his payments are increased to \$7.00 per month; thence to class D, \$9.00 per month. From class D he passes to class E, paying \$10.00 per month. It will be seen that the loans accrue quickly, for 5 bonds accumulate 1 maturity in class A, 4 in class B, 3 in class C, 5 in class D, and 5 in class E. Five bonds sold in one day mean one progression from class A and so on.

“Other Advantages.

“(1) If you cannot continue your payments the money you have paid into maturity fund is returned with 6 per cent interest as provided in the bond.”

There is no other statement which undertakes to represent the terms of the bonds and the rights accorded to the purchaser. Comparing the foregoing with the privileges, requirements, and conditions which are attached to and form a part of the bonds, they correspond exactly with them, and in no sense of the term can they be regarded as false statements. But, even if they were, the circular distinctly requires the purchaser to read the bonds. One of the conditions attached to the bonds themselves, which the plaintiff says he read, specifically provides that the entire contract is set forth in the bonds, that no one has the authority to alter, change, or modify the contract in any manner, and that the company is not to be bound by any statement, promise, or agreement, not contained therein, made by any person. When the plaintiff received and read his bonds, it was his privilege then to rescind his contract if he found that he had been misled. Having elected to retain them, he cannot now be heard to say that he was misled to his

prejudice by any representations made by Henry, or by any circular given him by Henry or mailed to him by the company before or after that time. For the evidence shows further that he made monthly payments for more than a year after that date, and actually obtained permission from the company to act as its agent in the same capacity as that in which Henry was acting at the time he entered into the contract.

When it appears that a party, who claims to have been deceived to his prejudice, has investigated for himself, or that the means were at hand to ascertain the truth or falsity of any representations made to him, his reliance upon such representations, however false they may have been, affords no ground of complaint. (*Pierce v. Ten-Eyck*, 9 Mont. 349, 23 Pac. 423; *McCormick v. Hubbell*, 4 Mont. 87, 5 Pac. 314; *Slaughter's Admr. v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627; *Osborne v. Missouri Pac. Ry. Co.* (Neb.), 98 N. W. 685; *Andrus v. St. Louis, S. & R. Co.*, 130 U. S. 643, 9 Sup. Ct. 645, 32 L. Ed. 1054; *Cagney v. Cuson*, 77 Ind. 494; *Salem India Rubber Co. v. Adams*, 23 Pick. (Mass.) 256; *Farnsworth v. Duffner*, 142 U. S. 48, 12 Sup. Ct. 164, 35 L. Ed. 931; *Long v. Warren*, 68 N. Y. 426.)

Viewing the complaint now as one for breach of the contract, there is no evidence to sustain a cause of action for the breaches alleged. The evidence shows that the defendant, whenever the bonds were ready to be advanced from one class to another, duly notified the plaintiff of that fact, and that the plaintiff immediately made remittances to meet the increased payments required by each advance. There is no suggestion in the evidence that the plaintiff ever at any time requested at any maturity or transition period, or at any other time, the privilege of withdrawal, until August, 1904, three months after he had ceased to make any payments whatever, and he had received notice that the contract would be forfeited unless prompt payment should be made. Nor is there any evidence that the maturity fund, out of which the plaintiff expected to have his bonds paid, depended exclusively upon the sale of bonds made

in the state of Montana. This is not a stipulation in the bond. Neither is there anything in the circular, nor on the face of the bonds themselves, nor in any of the conditions attached thereto, to indicate that any bond depended for its maturity upon the funds derived from sales of bonds at any particular locality. So that from whatever point of view we examine the evidence, we do not find any justification for the action of the district court in overruling the motion for nonsuit. It should have been sustained.

We have assumed for present purposes that the complaint states a cause of action on one or the other of the two theories mentioned. We do not care to be understood as expressing any opinion on this subject. Its sufficiency was challenged in the district court by demurrer. The demurrer, however, was never passed upon by the district court, for the reason that the defendant itself agreed that it might be overruled. So the question of the sufficiency of the complaint is not among those properly before this court for judgment. These remarks apply also to the second cause of action.

Since the judgment must be reversed for the reasons stated, it is not necessary to notice other assignments of error.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

**ANDERSON, RESPONDENT, v. NORTHERN PACIFIC RY.
CO. ET AL., APPELLANTS.**

(No. 2,249.)

(Submitted April 6, 1906. Decided April 30, 1906.)

***Master and Servant—Personal Injuries—Railways—Assump-
tion of Risk—Contributory Negligence—Instructions.***

Appeal—Dismissal—New Trial—Motion—Record.

1. Where it appears from an order denying a motion for a new trial, that two defendants joined in the motion, while the notice of appeal indicated that only one defendant made such motion, and where there is not anything in the record to show which defendant did so, the supreme court will, on its own motion, dismiss such appeal.

Appeal—Joint Appellants—Errors Considered.

2. On a joint appeal, errors not common to both appellants may be considered.

Joint Appeal—Errors Which will not be Considered.

3. On a joint appeal, one appellant will not be permitted to assume a position antagonistic to that of the other.

Appeal—Assignments not Argued—Waiver.

4. Assignments of error not argued or discussed by counsel on appeal will be deemed waived.

Nonsuit—What Facts Deemed Proved.

5. Upon a motion for a nonsuit those facts will be deemed proved which the evidence tends to prove.

Master and Servant—Personal Injuries—Knowledge of Danger—Question for Jury.

6. The plaintiff, employed as a brakeman on a railroad, was injured, while engaged in the performance of his duties, by being struck by a bridge erected over a spur track. He had never been on this spur before. The bridge was about eight feet above the track. The platform of the gondola car on which he was standing was three and one-half or four feet above the track. Plaintiff was a man of five feet and ten inches in height. There were no telltales or other devices for warning employees of the railroad of their approach to the bridge. Plaintiff was struck while endeavoring to release a defective brake. *Held*, that the question whether plaintiff knew or ought to have known of the danger incident to riding under this bridge while standing on the platform of a car was a question for the jury; and that, therefore, a motion for nonsuit was properly overruled.

Same—Railroads—Contributory Negligence—Instructions.

7. An instruction, in an action for personal injuries brought by a brakeman who was struck by a low bridge while performing his duties as such, which announced the principle that the servant, with knowledge of an existing danger, may be excused from what would otherwise be contributory negligence, if it appeared that an emergency arose by reason of which, while engrossed in the performance of his duties, he forgot the danger or did not appreciate his close proximity to it,

34	181
34	284
34	181
35	236
35	237
126	105
36	166

34	181
38	297

34	181
41	291

34	181
40	172
40	225
40	414
40	529

was properly given, the testimony showing that plaintiff was injured while endeavoring to release a defective brake after the train had started, and that his attention was absorbed by his duties for the time being.

Same—Assumption of Risk.

8. *Quære*: Is the doctrine that a servant, knowing of an existing danger, is excusable where he was injured while engrossed in the performance of his duties, by reason of an emergency which absorbs his whole attention, so that for the time being he forgets the danger or his close proximity to it, applicable against the defense of assumed risk?

Appeal—Invited Error—Instructions.

9. Where the district court at the request of appellant gave an instruction announcing an erroneous rule of law, but amended it in a particular which did not make it any more erroneous, the appellant may not complain.

Master and Servant—Railroads—Low Bridges—Duty of Master.

10. An instruction—in an action for personal injuries against a smelting company jointly with a railway company, by a brakeman who, while on cars which were being taken from the smelter over a spur track, was struck by a bridge constructed over the track and maintained by the smelting company—to the effect that if the employees of the railway company were taking out the cars from the smelter at the invitation, express or implied, of the smelting company, it owed to them the duty to keep the premises, as far as the bridge was concerned, in a reasonably safe condition, a violation of which would render it liable, states a correct rule of law.

Master and Servant—Railroads—Low Bridges—Negligence—Question for Jury—Instructions.

11. Whether the construction and maintenance of a bridge by a smelting company, jointly sued with a railway company, over a spur track so low as to cause a brakeman while performing his duties to be injured by coming in contact with it, constituted negligence on the part of the defendant smelting company, was a question for the jury, even though the bridge had a draw which could be removed and so rendered harmless; and a requested instruction charging, as a matter of law, that under such circumstances verdict should be for defendant smelting company, was properly refused.

District Courts—Requested Instructions—Refusal to Correct.

12. The district court is not bound to correct a requested instruction by striking out a sentence announcing an erroneous rule of law and then to give it as corrected; while it may do so, error cannot be predicated upon its refusal.

Master and Servant—Railroads—Duty of Master—Instructions.

13. Where, in an action for personal injuries, instructions relative to the duty of a railway company to its employees were couched in such language that any one of a number of different conclusions might have been drawn by the jury, the supreme court will not say that they selected one substantially correct and rejected those which were erroneous.

Master and Servant—Duty of Master—Railroads.

14. The duty which a railway company owes to its employees with respect to its roadway and appliances is to exercise ordinary care to furnish reasonably safe roadways and appliances, and to use ordinary care and diligence to keep them in a reasonably safe condition.

Personal Injuries—Instructions—Contributory Negligence—Knowledge of Danger.

15. An instruction, in a suit for personal injuries, that it was incumbent upon defendant to show that plaintiff, a brakeman, injured by

coming in contact with a bridge maintained over a railroad track, knew of the existence of the bridge before the defense of contributory negligence could become available, was erroneous in that, if a reasonably prudent man he ought to have known of the danger incident to the existence of the bridge, he was chargeable with such knowledge.

Personal Injuries—Railroads—Instructions—Assumption of Risk—Knowledge of Danger.

16. To charge the jury, in a personal injury case, that the plaintiff, a brakeman, injured by coming in contact with a bridge erected over a railway track, must have had actual knowledge of the fact that the bridge was so low that he could not safely pass under it while standing on the platform of a car, before the defense of assumption of risk could be said to be established was error, since he could not recover if, as a reasonably prudent man, he ought to have known and comprehended the danger.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Harry Anderson against the Northern Pacific Railway Company and the Helena and Livingston Smelting and Reduction Company. Judgment for plaintiff. Defendants appeal. Affirmed as to defendant smelting company; reversed and new trial ordered as to defendant railway company.

Messrs. Wallace & Donnelly, for Appellant, Northern Pacific Ry. Co.

The motion for a nonsuit presented to the court this question: May a man, in the full possession of his faculties, of long experience in the work at which he was employed, in broad daylight, on a clear day, stand facing a trestle of the size above described, at a distance of less than fifty feet from it, walk deliberately toward it for a distance of twenty feet with nothing save it to occupy his attention, pass under and to a point one hundred feet beyond it, climb up and upon the platform of a car, from which he must inevitably be swept if he assumes and maintains an erect attitude upon it, actually take and maintain such an attitude, and then, when the inevitable happens, excuse his carelessness of his own safety by the statement that he did not know that the trestle was there? We insist that the plaintiff's mere assertion of his ignorance of that of which the simplest exercise of a single one of his senses might have

apprised him, cannot excuse him, and the case ought to have closed with the submission of the plaintiff's testimony. (Labbatt on Master and Servant, p. 1020; *Ragon v. Toledo etc. Ry. Co.*, 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612; *Gibson v. Erie Ry. Co.*, 63 N. Y. 450, 20 Am. Rep. 552; *Day v. Cleveland etc. Ry. Co.*, 137 Ind. 206, 36 N. E. 854; *Jennings v. Tacoma etc. Ry. Co.*, 7 Wash. 275, 34 Pac. 937; *Tuttle v. Detroit etc. Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114.) That a charge that the railway company was bound to keep its track in a safe condition (Instruction No. 5), and that it was obliged to provide suitable and safe material and structures in the construction of its road and appurtenances (Instruction No. 4) is erroneous, and that a judgment must be reversed which rests on a verdict reached under such instructions are propositions which are abundantly established by the authorities. (*Hughley v. Wabasha*, 69 Minn. 245, 72 N. W. 78; *Nutt v. Southern Pac. Ry. Co.*, 25 Or. 291, 35 Pac. 653; *Allen v. Union Pac. Ry. Co.*, 7 Utah, 239, 26 Pac. 297; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *Kranz v. White*, 8 Ill. App. 583; *Peoria etc. Ry. Co. v. Johns*, 43 Ill. App. 83; *Jones v. New York Cent. etc. Ry. Co.*, 22 Hun, 284; *Quinlivan v. Buffalo etc. Ry. Co.*, 52 App. Div. 1, 64 N. Y. Supp. 795; *Gulf etc. Ry. Co. v. Wells*, 81 Tex. 685, 17 S. W. 511; *International etc. Ry. Co. v. Williams*, 82 Tex. 342, 18 S. W. 700; *Eddy v. Adams* (Tex.), 18 S. W. 490; *Gulf etc. Ry. Co. v. Johnson*, 1 Tex. Civ. App. 103, 20 S. W. 1123; *Galveston etc. Ry. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301; *Galveston etc. Ry. Co. v. Gormley* (Tex. Civ. App.), 27 S. W. 1051; *Anderson v. Michigan Ry. Co.*, 107 Mich. 591, 65 N. W. 585; *Belleville etc. Works v. Bender*, 69 Ill. App. 189; *Gormully etc. Mfg. Co. v. Olson*, 72 Ill. App. 32; *Chicago etc. Ry. Co. v. Garner*, 78 Ill. App. 281.) A palpably erroneous charge of this kind is not cured by a correct statement of the law in another portion of the charge. (*Fort Worth etc. Ry. Co. v. James* (Tex. Civ. App.), 87 S. W. 730.)

In Instructions 7 and 9 the jury are told that absolute knowledge on the part of the plaintiff of the bridge and its dangers is a condition of their finding either that the plaintiff had assumed the risk or that he was guilty of contributory negligence. This was error. (*Labatt on Master and Servant*, 1020, 1021; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763; *Louisville etc. Ry. Co. v. Shivell*, 13 Ky. Law Rep. 902, 18 S. W. 944; *Louisville etc. Ry. Co. v. Hall*, 91 Ala. 112, 24 Am. St. Rep. 863, 8 South. 371; *Hewitt v. Flint etc. Ry. Co.*, 67 Mich. 61, 34 N. W. 659; *Hill v. Meyer Bros. Drug Co.*, 140 Mo. 433, 41 S. W. 909; *Benjamin-Atha etc. Co. v. Costello*, 63 N. J. L. 27, 42 Atl. 766; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Klatt v. N. C. Foster Lumber Co.*, 92 Wis. 622, 66 N. W. 791; *Craven v. Smith*, 89 Wis. 119, 61 N. W. 317; *Taylor etc. Co. v. Hage*, 32 U. S. App. 548, 69 Fed. 581, 16 C. C. A. 339; *Union Pac. Ry. Co. v. Monden*, 50 Kan. 539, 31 Pac. 1002; *Haley v. Jump River Lumber Co.*, 81 Wis. 412, 51 N. W. 321; *Illinois Cent. Co. v. Sporleder*, 90 Ill. App. 590; *Muldowney v. Illinois Cent. Ry. Co.*, 39 Iowa, 619.)

What will excuse either an employee's failure to observe unknown dangers, or his forgetfulness of known ones, must be something in the nature of an *emergency*. (*Cummings v. Helena etc. Co.*, 26 Mont. 434, 68 Pac. 852; 1 *Labatt on Master and Servant*, secs. 350, 351; *Greenleaf v. Dubuque etc. Ry. Co.*, 33 Iowa, 58; *St. Louis etc. Ry. Co. v. Higgins*, 53 Ark. 458, 14 S. W. 653; *Baylor v. Delaware etc. Ry. Co.*, 40 N. J. L. 23, 29 Am. Rep. 208; *Chicago etc. Ry. Co. v. Donahue*, 75 Ill. 108.) Where assumption of risk as well as contributory negligence is pleaded, the master is entitled to the defense that the plaintiff *assumed the risk*, if the facts established it, even though those facts may not, in consequence of their attendant extenuating circumstances, be sufficient to charge plaintiff with contributory negligence. And where the servant sees the danger, and appreciates it and goes ahead with the performance of duties which will make it necessary for him to encounter it, he

assumes the risk of injury in the performance of such duties. From this standpoint, the question of negligence and contributory negligence is excluded. The whole question becomes one of contract. (Labatt on Master and Servant, sec. 281, and cases cited.)

Messrs. McConnell & McConnell for Appellant, Helena and Livingston Smelting and Reduction Company.

Neither defendant is liable to the plaintiff by reason of his assumption of risk of injury at this commercial spur. In the first place the plaintiff was derelict in his duty for permitting the train to start before the brake was released; in the next place he assumed the risk by virtue of his employment of all obstructions or instrumentalities used for loading upon these commercial spurs. The danger from this bridge (if danger it was) was an open and manifest one. (*Lamotte v. Boyce*, 105 Mich. 545, 63 N. W. 518; *Soderstrom v. Holland-Emery Lumber Co.*, 114 Mich. 83, 72 N. W. 13; *Louisville etc. Ry. Co. v. Banks*, 104 Ala. 508, 16 South. 550; *Appel v. Buffalo etc. Ry. Co.*, 111 N. Y. 550, 19 N. E. 93; *Chicago etc. Ry. Co. v. McGinnis*, 49 Neb. 649, 68 N. W. 1057.)

Mr. T. J. Walsh, and *Mr. R. R. Purcell*, for Respondent.

If, on a joint appeal, each appellant may separately assign error, it is evident that only those errors can be considered that are assigned in common—those that are available to both parties. (2 Cyc. 1003; *City of Lincoln v. Bailey* (Neb.), 99 N. W. 830; *Gordon v. Little*, 41 Neb. 250, 59 N. W. 783.)

Instruction No. 4 is an application to this particular case of the law as expressed by the supreme court of the United States speaking through Chief Justice Fuller in *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 451-457, 16 Sup. Ct. 618, 40 L. Ed. 766.

Appellants have no right to take a single phrase or sentence from the body of the instructions, and insist that it is erroneous, when it cannot be denied that the instructions, as a whole, are

correct. (*Johnson v. Boston etc. Min. Co.*, 16 Mont. 164, 40 Pac. 298; *St. Louis etc. Ry. Co. v. Needham*, 69 Fed. 823, 16 C. C. A. 457; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896; *Northern Pac. Ry. Co. v. Mix*, 121 Fed. 476, 57 C. C. A. 592; *Baltimore etc. Ry. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; *Anderson v. Daly Min. Co.*, 16 Utah, 28, 50 Pac. 815; *Chicago etc. Ry. Co. v. Linney*, 59 Fed. 45, 7 C. C. A. 656; *Diamond v. Planet etc. Mfg. Co.*, 97 App. Div. 43, 89 N. Y. Supp. 635. See, also, *Davis v. Trade Dollar C. M. Co.*, 117 Fed. 122, 54 C. C. A. 636; *Lemman v. City of Spokane*, 38 Wash. 98, 80 Pac. 280; *Grijalva v. Southern Pac. Co.*, 137 Cal. 569, 70 Pac. 622.)

It was negligence *per se* on the part of the railroad company to operate its trains under the overhead bridge. Overhead bridges, constructed so low as to catch a man in the discharge of his ordinary duties in the service of a railroad, have been condemned by text-writers and courts in language more fierce and denunciatory than the writer would think of using in a brief addressed to this court. (Beach on Contributory Negligence, 363; 4 Thompson's Commentaries on Negligence, 4315; 1 Shearman and Redfield on Negligence, 198; *Louisville etc. Ry. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432-448, 16 N. E. 145, 17 N. E. 584; *Louisville etc. Ry. Co. v. Cooley*, 20 Ky. Law Rep. 1372, 49 S. W. 339; *Atchison etc. Ry. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010-1014; *Chicago etc. Ry. Co. v. Carpenter*, 56 Fed. 451, 5 C. C. A. 551; *Chicago etc. Ry. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381; *Keist v. Chicago etc. Ry. Co.*, 110 Iowa, 32, 81 N. W. 181-183; *Gusman v. Caffery etc. R. R. Co.*, 49 La. Ann. 1264, 22 South. 742.) Some contention was made at the trial that the rule announced by the authorities last cited does not apply when the overhead obstruction is on a spur or side track, that as to such tracks such obstructions are permissible, the claim being founded on some remarks made in *Phelps v. Chicago etc. Ry. Co.*, 122 Mich. 171, 81 N. W. 101, 84 N. W. 66. This case is commented on by Labatt in a manner calculated to impair its usefulness as a precedent.

(1 Labatt on Master and Servant, 58, note 5, p. 151.) In the following cases the dangerous obstruction was maintained near or over a side or spur track: *Flanders v. Chicago etc. Ry. Co.*, 51 Minn. 193, 53 N. W. 544; *Kelleher v. Milwaukee etc. Ry. Co.*, 80 Wis. 584, 50 N. W. 942; *Clark v. St. Paul etc. Ry. Co.*, 28 Minn. 128, 9 N. W. 581; *Keist v. Chicago etc. Ry. Co.*, 110 Iowa, 32, 81 N. W. 181; *Allen v. Burlington etc. Ry. Co.*, 64 Iowa, 94, 19 N. W. 870; *Choctaw etc. Ry. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Texas etc. Ry. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382.

Instruction No. 8 has the sanction of courts and text-writers. (4 Thompson's Commentaries on Negligence, 4751, 4752, 4315; *Wallace v. Central Vt. Ry. Co.*, 138 N. Y. 302, 33 N. E. 1069; *Kane v. Northern Cent. Ry. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Louisville etc. Ry. Co. v. Cooley*, 20 Ky. Law Rep. 1372, 49 S. W. 339; 1 Shearman and Redfield on Negligence, 199; *Maher v. Boston etc. Ry. Co.*, 158 Mass. 36, 32 N. E. 950.) Telltales should have been erected by the company. (*Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Harry Anderson, the respondent, was a freight brakeman employed by the Northern Pacific Railway Company. In September, 1903, he was injured while in the performance of his duties, and brought this action to recover damages from the railway company and from the Helena and Livingston Smelting and Reduction Company, alleging negligence on the part of the defendant smelting company in constructing and maintaining, and on the part of the railway company in permitting the construction and maintenance of, a certain bridge or trestle over the track of the railway company at the smelting company's concentrator at Corbin, in Jefferson county. The bridge or trestle was used by the smelting company to load

cars with ore and other products for shipment. It is alleged that this bridge or trestle was so low that an employee of the railway company could not pass under it while standing upon the platform of an ore car, and that neither the smelting company nor railway company erected or maintained telltales or other devices to warn employees of the railway company of the approach to such bridge or trestle. It is further alleged that this bridge or trestle was erected over a spur track operated by the railway company for the use of the smelting company; that on the day of the accident the defendant railway company operated a train on this spur track at the request of the defendant smelting company, and that, while the plaintiff was on one of the cars constituting the train, he came in contact with the timbers of the bridge or trestle, was knocked from the train, and severely injured.

The defendant railway company denies any negligence on its part; denies that the spur track is upon its right of way, but alleges that it is upon property owned entirely by the defendant smelting company. It admits, however, that the spur track was constructed by the joint efforts of the railway company and the smelting company. The plaintiff's contributory negligence and assumption of risk are also pleaded. The defendant smelting company denies any negligence on its part; alleges that the spur track was constructed in part upon ground owned by the smelting company, and in part upon the right of way of the railway company, and that while it was built by the joint efforts of the two companies, the smelting company was fully repaid by the railway company, and that the railway company owns the spur entirely. The smelting company admits that it erected the bridge or trestle, but alleges that the span of the bridge or trestle, immediately over the roadbed or railway track is constructed as a drawbridge solely for the benefit of the railway company, and that the railway company has the exclusive control of such drawbridge. It also alleges that the plaintiff's injury was caused by reason of the brake on the last of the cars of the train being out of

order through the negligence of the railway company. It also pleads the defenses of contributory negligence and assumption of risk. All the material allegations of these answers are put in issue by the replies.

The plaintiff recovered judgment, and each defendant gave its separate notice of intention to move for a new trial, prepared its separate statement, and made its separate assignments of errors. How these matters were submitted to the district court does not clearly appear. The court's order is as follows: "In this cause court this day ordered that defendants' motion for a new trial herein is denied."

The defendants gave a joint notice of appeal and only one undertaking on appeal. After reciting the appeal from the judgment, the notice of appeal reads: "And also from an order made and entered in said court and cause on the 21st day of August, 1905, overruling defendant's motion for new trial in said action."

While a motion to dismiss the pretended appeal from the order denying a new trial has not been made, it is urged that such pretended appeal cannot be considered. The order of the court would seem to indicate that the defendants joined in the motion for a new trial; while the notice of appeal in the case indicates that only one defendant made such motion, and, if that is true, there is not anything to indicate which defendant did so. We therefore, of our own motion, dismiss the pretended appeal from the order denying a new trial and will consider only the joint appeal from the judgment.

On such appeal counsel for the respondent urge that the appellants must join in their assignments of error, and that this court cannot consider alleged errors not common to both appellants. The authorities cited in support of this contention, however, are not directly in point. They are from states where the method of review is by writ of error and refer to cases where joint assignments of error were made. This question has not been before this court directly, but we have heretofore proceeded upon the assumption that proper practice might warrant the

affirmance of a judgment as to one joint appellant and its reversal as to another. (*Cook v. Gallatin Ry. Co.*, 28 Mont. 340, 72 Pac. 678; *City of Butte v. Cook*, 29 Mont. 88, 74 Pac. 67; *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994.) In the absence of any authorities directly in point to the contrary, we prefer to follow the rule heretofore adopted, or which seems to be implied by the position which this court has heretofore assumed. We, however, adopt the suggestion of counsel for respondent to this extent: That one joint appellant will not be permitted to assume a position in this court antagonistic to his other joint appellant. It was evidently one purpose of section 1721 of the Code of Civil Procedure, in permitting any aggrieved party to appeal, to enable one defeated party to urge an antagonistic attitude as against another defeated party, as well as against the successful litigant, by a separate appeal. But it would seem entirely inconsistent with proper practice to permit one of two joint appellants to assume a position antagonistic to his joint appellant. In so far as the position of either of these appellants is antagonistic to the other, it will not be considered.

The railway company assigns as errors the giving of instructions 4, 5, 7, 8, 9, 11 and 13 respectively. The defendant smelting company assigns as errors the giving of instructions 6, 8, 10 and 13 respectively. As the smelting company does not predicate error upon the giving of instructions 4, 5, 7, 9 or 11, it is presumed to be satisfied with them. Counsel for the smelting company do not discuss the assignments of error predicated upon the giving of any instructions. In their brief they say: "We will not enter into the discussion of the errors committed by the court in the instructions given to the jury, as this has been so ably done by counsel for the defendant railway company." But counsel for the railway company do not discuss the giving of instructions 6 or 10, and therefore these assignments are not discussed by anyone, and under the well-established rule of this court and other appellate courts, assignments not argued will be deemed waived. We therefore eliminate from consideration

the assignments predicated upon the giving of instructions 6 and 10.

The common errors assigned are (1) the refusal of the court to grant a nonsuit; (2) the giving of instruction No. 8; and (3) the giving of instruction No. 13.

Applying the well-recognized rule, that upon a motion for nonsuit those facts will be deemed proved which the evidence tends to prove, it appears that the plaintiff had never been over the Boulder Branch of the Northern Pacific Railway but three or four times prior to the day of this accident; that he had never been on this spur at Corbin before that day; that the smelting company had loaded four cars with concentrates, one of which cars stood immediately under the bridge or trestle, and the other three beyond it. The superintendent of the concentrator requested the train crew, of which this plaintiff was a member, to take these loaded cars from the spur for shipment to the smelter at East Helena. The locomotive was detached from the train on the main line and backed in on the spur nearly to the car beneath the bridge, the entire train crew riding. This plaintiff then stepped down from the locomotive, walked back under the bridge or trestle and, as was his duty, removed blocks from under the wheels of the cars, saw to it that the cars were coupled together, that the air was properly coupled and the angle cocks properly turned. He walked back to the last car, mounted upon the platform of that car to release the ordinary hand brake. The bridge is about eight feet or eight feet two inches above the track. The cars in use were the ordinary gondola cars, the platforms of which are from three and one-half to four feet above the track. The plaintiff is a man about five feet nine inches in height. The plaintiff testifies that he looked down in going back from the locomotive in performing the duties of his office. About the time plaintiff undertook to release the brake on the rear car, the train commenced to move, and by the time the car upon which he was standing reached the bridge, the train was moving at a rate of from eight to ten miles an hour. The brake did not respond readily to plaintiff's efforts and, while engaged in at-

tempting to release it and while his attention was absorbed in this duty, he was struck by the bridge and injured. There were no telltales or other devices for warning the employees of the railway company of their approach to this bridge, and the plaintiff testifies that he was not informed of it and knew nothing about it. There was not any evidence offered by plaintiff respecting the control of the drawbridge, except that it had never been removed before this accident, and when it was removed afterward, it was done by the employees of the smelting company and was quite a difficult undertaking. It appears that this spur was used by the railway company for general commercial purposes in addition to the business of the smelting company. The plaintiff then offered testimony showing the extent of his injuries and rested his case. Each of the defendants moved for a nonsuit, upon the ground (generally speaking) that the plaintiff had failed to make out a case sufficient to go to the jury. These motions were denied, and error is predicated upon the denial.

It is earnestly urged that, if the plaintiff did not see the bridge when he passed from the locomotive to the rear of the train, he ought to have seen it, and ought to have appreciated the fact that he must be swept from the car if he stood upon the platform while the car was being drawn under the bridge, and by the exercise of ordinary care he would have seen it and appreciated such fact, and therefore he is chargeable with such knowledge. Of course, every master has a right to expect that his servant will be alert, and will inform himself of existing conditions about the place of his employment. The master is not required to furnish the servant with eyes to see and ears to hear. It is also a rule that the servant, upon entering the service, assumes the risks and perils incident to the employment, so far as such risks and perils are open, apparent and discernible by a person of his age and capacity in the exercise of reasonable care for his own safety. But we do not think that these rules are at all inconsistent with that heretofore adopted by this court, namely: if the questions whether the servant knew or ought to have known of the danger are in dispute, and from the facts stated "different

conclusions might be drawn by different men of fair, sound minds, then the matter must go to the jury; but if only one conclusion can be reached by men of fair, sound minds, the determination is for the court." (*Prosser v. Montana Central Ry. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701.)

The *McCabe Case* illustrates the principle involved here. In that case the plaintiff was a switchman employed in the yards at Great Falls. He had frequently had occasion to see the different switch-stands in the yards; but this court, in reversing the district court for granting a nonsuit, held that whether the plaintiff assumed the risk necessarily depended upon his knowledge or means of knowledge as to the location of switch-stand No. 2, that is, his knowledge or means of knowledge of its close proximity to the track, and that upon the plaintiff's denial of such knowledge and the circumstances appearing from the evidence, which did not present so strong a case for the plaintiff as do the facts above narrated, the motion for nonsuit should have been denied and the question of his knowledge or opportunity of knowing left to the jury.

The plaintiff was not required to carry a rule with him and measure the distance from the bridge to the platform of the car where he stood, and the mere fact that he may have noticed on the first trip which he made on this spur, if he did do so, that the bridge timbers were only about eight inches above the top of the gondola car is not sufficient to justify a court in saying, as a matter of law, that he should have appreciated the danger to himself in case he should attempt to ride upon the platform of the car while it was being drawn under the bridge. And this is not opposed to the doctrine announced in *Jennings v. Tacoma Ry. etc. Co.*, 7 Wash. 275, 34 Pac. 937, cited by counsel for the railway company. In that case the plaintiff permitted himself to stand between a brick wall and a passing car where the space was only three and one-half inches, but the court said: "Had the space between ten or twelve or fourteen inches, the man might readily have been deceived and have been led into trouble."

And so, in this case, we are not prepared to say that if the space between the platform of the car and the bridge had been but one foot or two feet, and plaintiff's duty had not required his attention away from the bridge, he might not then have been charged with knowledge of the danger, but this we do not decide. However, had he observed the bridge, which he says he did not, we are not prepared to say that he ought to have appreciated the fact that the distance between the platform of the car and the bridge was only four or four and one-half feet. We think the case presented by this plaintiff was much stronger than that in the *McCabe Case*; but the decision in the *McCabe Case* completely disposes of the contentions made by counsel for appellants. The motions for nonsuit were properly overruled.

Instruction No. 8 is as follows: "You are instructed that although you should find that the plaintiff knew of the existence of the bridge or trestle, and knew that it was so low as that he could not pass under it in safety, standing where he stood at the time he was injured, yet, if, at the time he was injured, he was engaged in discharging his duties as a brakeman, and by reason of his attention to his duties, and his absorption in their discharge, he omitted for the moment to think of the bridge, or thinking of it, did not recognize that the train had already proceeded so far as would bring him in contact with it; and you further believe from the evidence that a reasonably prudent man, under all the circumstances, might have omitted for the moment to bear in mind the danger, or to recognize that he was in such close proximity to the bridge, considering the speed at which the train was going, then the plaintiff was not negligent in forgetting, if he did forget, about the bridge, or in failing to recognize, if he did fail to recognize, how close he was being brought to it."

This instruction involves a consideration of the question: May a servant, with knowledge of an existing danger, excuse himself from what would otherwise be his contributory negligence, by saying: "I knew the danger, but for the moment I was so completely engrossed in the performance of my duties that I forgot

the danger or did not appreciate the fact that I was in close proximity to it"?

That there is a well-established rule of law respecting this question is conceded. The extent of the rule rather than its existence is the subject of controversy. It has been variously stated by various courts and text-writers, and in many instances the conclusions reached are not reconcilable. But the trend of the modern decisions is toward the rule considered more humane from the standpoint of the servant, which resolves itself into a declaration that, if the service is of such a character as to *engross* the attention of the servant, the master may not say the servant should have divided his attention between the performance of the particular duty and keeping a lookout for danger. In other words, if the servant has two duties to perform, one to do the work of his office and the other to be vigilant in looking out for danger, his failure to perform the latter will not, as a matter of law, constitute contributory negligence, where such failure results from the necessary observance and performance of the former, where such observance and performance engross his attention, if a reasonably prudent man under the circumstances would have been likely to make the same mistake. And the reason for the rule is apparent. It goes without saying that, if the servant's attention is *engrossed* by the performance of one duty, it cannot be divided between the performance of that and of another; and it would be a harsh rule indeed which would permit the master to say to his servant: "You must perform the duties of your position, even though such performance requires your undivided attention, and at the same time you must give a portion of your attention to known dangers or suffer the consequences of an accident."

We think the rule we have announced is supported by the decided weight of modern authority. In substance it is announced in 1 Labatt on Master and Servant, section 350. That author, after considering the inapplicability of the doctrine to defeat the plea of assumed risk, says: "A materially different situation is presented where the fact is considered in regard to its bearing

upon the question of how far the servant's close attention to his duties tends to rebut the inference of contributory negligence. In this point of view the effect of the decisions may be summed up as follows: Where the servant failed to take such precautions as were appropriate for the purpose of protecting himself at the moment when the accident occurred, evidence that such failure was due to the fact that his attention was engrossed by his duties is always competent for the purpose of rebutting the inference of contributory negligence which might otherwise be drawn from his conduct; and if such evidence is offered, a court is very seldom justified in declaring him to have been, as a matter of law, wanting in proper care." A long list of modern authorities is cited in support of the text. And we think the author is entirely consistent too, in section 351, wherein he announces the limits of the doctrine, as follows: "To justify applying, for the servant's benefit, the doctrine stated in the last section, it must appear from the evidence that the circumstances were either such as to create a situation approaching to or constituting an emergency, or such as to exhibit the servant in the light of a person who was discharging a duty which demanded an unusual amount of attention. The effect of allowing it to operate in cases where he was merely discharging, under normal conditions, some ordinary function incident to his employment, would manifestly be to render the defense of contributory negligence little more than a merely nominal protection to the master."

Of course, if the evidence showed that the plaintiff was merely performing his ordinary duties under normal conditions, we are not ready to say (and it is not necessary for us to say in this case) that he could excuse himself by asserting that he forgot a known danger, although some of the authorities appear to go to this extent, but in this instance every requisite of the rule we have announced is fully met. The evidence is ample to show that an emergency arose. The train started before the brake was released. Plaintiff's duties required him to act promptly and with dispatch. The brake refused to respond as it should have

done, and plaintiff's attention was absorbed in attempting to perform his duty.

The facts in *Cummings v. Helena and Livingston Smelting and Reduction Co.*, 26 Mont. 434, 68 Pac. 852, are quite different from those in this case, and the doctrine there announced, we think, is not inconsistent with the rule just stated. In our opinion, instruction No. 8 fairly states the law. Whether this doctrine is applicable against the defense of assumed risk is not before us. It is only argued as presented by instructions 8 and 13 given, and the railway company's refused instructions 2 and 3, and these all have to do with the question of contributory negligence and not with the defense of assumed risk.

Instruction No. 13 is erroneous, but it is not subject to the attack made upon it by counsel for the railway company, and, as the smelting company relies entirely upon the argument made by the railway company, it is not open to attack at all in this case. It is not open to the particular attack made by the railway company, for the reason that it is practically the same instruction as No. 6 requested by that company. The instruction as given is as follows:

"Before the plaintiff can be excused for failing to see the tramway, if you find that a reasonable person exercising reasonable watchfulness ought to have seen it, it must appear from the evidence that his duties were claiming his attention, and therefore drawing his attention from the tramway and other visible things from the time when he first could have seen it; and if there was any reasonable period from the time that he stepped on the ground beside the engine at the gangway, while he was walking toward the tramway, during which he had no duty of the kind referred to to perform, or before his duties began, which period was reasonably sufficient to have enabled a person not engrossed in duties to have noticed the tramway, then you are instructed that the plaintiff's failure to notice it under such circumstances would be contributory negligence and would prevent his recovery in this action, unless you should also find from the evidence that, at the moment of the accident, his attention was so

far absorbed in the discharge of duties required of him at that moment that he omitted to think of the bridge." The court omitted an opening sentence, which did not add anything of merit, and added these words: "Unless you should also find from the evidence that, at the moment of the accident, his attention was so far absorbed in the discharge of duties required of him at that moment that he omitted to think of the bridge," and added a further sentence which is not criticised.

It will be observed that, in the instruction as offered by the railway company, the rule is announced that, in order for plaintiff to excuse his failure to see the tramway, his duties must have been claiming his attention from the time when he first could have seen it. The amendment made by the court only limits this like doctrine to the particular moment of time when the plaintiff was injured, and however erroneous the instruction is, it was not made any more so by the amendment, and the railway company cannot complain that the court announces a rule of law which it itself had urged upon the court. We think there is not any difference whatever in principle between the rule embraced in the instruction as offered and the one in the amendment.

Counsel for the smelting company urge that the court erred in refusing its offered instruction No. 8, as follows:

"The court further instructs you that before you can find in favor of the plaintiff as against the smelting company, you must find that said smelting company owed a duty to the plaintiff and failed to exercise ordinary care or skill toward him, by which failure the plaintiff, without contributory negligence on his part, suffered the injury complained of. In determining this question as to whether the smelting company owed any duty to the plaintiff you will take into consideration the fact that the plaintiff had no contract whatever with the smelting company; that he did not sustain the relation of servant to master to the defendant smelting company, but that the plaintiff was the servant of the defendant railway company and not under the control or direction of the smelting company, and if, upon the consideration of all the facts proven in the case, you find that the defend-

ant smelting company owed no duty to the plaintiff by the violation of which the injury was caused on the part of the smelting company to the plaintiff, then your verdict should be in favor of the defendant smelting company."

The court by instruction No. 6 (any objection to which is waived by the failure of either defendant to argue the matter) told the jury in effect that if the employees of the railway company, including the plaintiff, were taking out the cars from the concentrator at the invitation, express or implied, of the smelting company, then the smelting company did owe to such employees a duty, any violation of which would render that company liable. That this is a correct rule of law and applicable to the facts of this case can hardly be questioned. The rule is stated with the authorities in support of it, in 21 Encyclopedia of Law, second edition, 471, and Thompson on Negligence, sections 978, 979. Under the circumstances of this case, the requested instruction No. 8 could hardly have failed to mislead the jury. The court, having submitted a correct rule of law for the guidance of the jury, properly refused the instruction requested.

It is also urged by the smelting company that the court should have instructed the jury, as a matter of law, that if the bridge or trestle was built with a drawbridge, which could be removed and thereby rendered harmless, then the verdict should be in favor of the smelting company. But we think that was also properly refused. It can hardly be said that the mere fact that the bridge could be removed would, as a matter of law, absolve the smelting company from liability. It is charged with negligence in constructing and maintaining the bridge so low that it was dangerous to the employees of the railway company in discharging their duties about it. Whether the construction and maintenance of the bridge in the manner in which it was constructed and maintained constituted negligence on the part of the smelting company, we think was a question to go to the jury under proper instructions.

Counsel for the smelting company also asked the court to give an instruction numbered 6, which might have been proper had

it not contained the concluding sentence: "And if he (plaintiff) knew the bridge was there and at the moment forgot the same, this will not excuse him." Of course this last sentence is directly opposed to the doctrine announced in instruction No. 8, given by the court and approved by us, but counsel in their reply brief say: "The fact that we added to this instruction the following: 'And if he knew the bridge was there and at the moment forgot the same, this will not excuse him,' affords no excuse for not giving that portion of the charge above quoted. The court could have stricken out this portion just as he added a modification to the instruction 13 as requested by counsel for the railway company." The court, of course, might have stricken out this objectionable sentence, but it was not bound to do so, and error cannot be predicated upon its refusal.

So far as the smelting company is concerned, our attention has not been directed to any reversible error committed by the court. Upon the facts the case was properly submitted to the jury. The errors assigned which are presented by this company and which are not antagonistic to its joint appellant, have all been considered, if not discussed separately.

On behalf of the railway company it is urged that the court erred in giving instructions 4, 5, 7 and 9. Instructions 4 and 5 deal with the question of the master's duty to the servant. In No. 4 it is declared: "A railway company is bound to provide suitable and safe material and structures in the construction of its road and appurtenances, and to maintain them in a reasonably safe condition." Further on in the same instruction there is an attempt apparently made to limit or explain this sweeping statement as follows: "The railway company is not to be held as guaranteeing or warranting absolute safety under all circumstances, but is bound to exercise the care which the exigencies reasonably demand in furnishing a proper roadbed and track, and in keeping the same free from obstruction with which its servants are likely to come in contact and be injured in the ordinary discharge of their duties." In No. 5 it is said that "the defendant railway company was bound to use due care as between it and its servants,

and to keep the track on which it was operating its cars at the time the plaintiff was injured in a safe condition for the use of its servants in doing the work for which their duties devolved upon them." And further on in the same instruction it is said: "It was bound to use due care to keep them in a reasonably safe condition"; and again: "If the defendant railway company did not own or control the track, it was bound to see that it was kept in such condition as that it was reasonably safe for the employees of the railway company to do their work on and over it."

It is unfortunate that some courts, including this one, have been extremely careless in attempting to define the master's duty in this regard; but no useful purpose can be subserved in continuing the like practice after our attention has been called to the error, as is done in this instance.

It will be observed that in instruction No. 4 the jury was told that the master's duty is (1) to provide suitable and safe materials and structures, and maintain them in a reasonably safe condition; (2) to exercise the care which the exigencies reasonably demand in furnishing a proper roadbed and track, and in keeping the same free from obstructions. Was the jury to understand that this was intended to be two statements of the same rule, or the statement of two different rules, and, if the latter, which rule should control? In fact neither is a correct statement of the law. In instruction No. 5 the master's duty is again defined to be (1) to use due care as between itself and its servants; (2) to keep the track in a safe condition for doing the work required of the servant; (3) to use due care to keep the track and appliances in a reasonably safe condition; and (4) to see that the track was kept in such condition as that it was reasonably safe for the servant to do his work. Having read these instructions, the jury might properly have drawn any one of a half dozen different conclusions as to the master's duty toward the servant; but the most natural conclusion, it seems to us, for the jury to have drawn, would have been that the court was simply stating the same rule in different terms, and that, in fact, the various statements were intended to mean the

same thing. It is asking altogether too much of this court to say that the jury selected the one statement of the rule which is substantially correct so far as it goes, and rejected the other statements of it which are erroneous. The rule of law defining the master's duty to his servant in this respect is: The master's duty to the servant is to exercise ordinary care to furnish reasonably safe roadways and appliances, and use ordinary care and diligence to keep them in a reasonably safe condition. (*Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433; 4 Thompson on Negligence, sec. 3767.) We hardly think this court would be justified, under all the facts presented by this record, in saying that it was negligence *per se* on the part of the railway company to operate its trains under this bridge or trestle.

In its instruction No. 7 the court said: "The plaintiff is not required to prove to your satisfaction that he is not guilty of contributory negligence; the defendants must prove that he was. So likewise the plaintiff is not obliged to prove to you that he did not know of the existence of the bridge, and that it was so low that he could not perform his duties in safety. The defendants must show that he had such knowledge." And instruction No. 9 is as follows: "In order to establish the defense of assumed risk in this case, it is not enough that it should appear from the evidence that the plaintiff knew of the existence of the bridge. You must reach the conclusion from the evidence, not only that he knew of the existence of the bridge, but also that he knew it was so low that he could not pass under it in safety while standing on the platform of the car in the discharge of his duties, or you must find in favor of the plaintiff on this issue."

Each of these instructions is clearly erroneous. Actual knowledge on the part of plaintiff of the existence of the danger is made the test of plaintiff's assumption of risk. If such circumstances were shown that a reasonably prudent man ought to have known of the danger, the plaintiff was chargeable with knowledge, even though in point of fact he may not have had such knowledge. In 4 Thompson on Negligence, section 4647, the rule is more fully stated as follows: "Negligent ignorance being in

law tantamount to knowledge, it is sufficient, to put upon the servant the disadvantage of accepting the risk, that he knew of the source of danger, or might have known of it by the exercise of that measure of care which he ought to take for his own safety under the circumstances of the particular case, which comes within the description of ordinary or reasonable care. The true test by which to determine whether the servant assumed the risk of the particular danger as one of the ordinary risks of his employment, and whether he was guilty of contributory negligence in facing or neglecting the danger, is to consider whether, under all the surrounding conditions, he *ought* to have known and comprehended the danger, and not whether, in point of fact, he did know and comprehend it."

We have examined the other assignments made by the railway company, but think they are without merit.

As to the defendant Helena and Livingston Smelting and Reduction Company, the judgment is affirmed. For the errors in giving instructions 4, 5, 7 and 9, the judgment is reversed and a new trial ordered as to the defendant Northern Pacific Railway Company, which has specified and urged these errors.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Petition for rehearing filed by the appellant Helena and Livingston Smelting and Reduction Company denied June 16, 1906.

KENNEDY, ADMINISTRATRIX, APPELLANT, v. DICKIE, RESPONDENT.

(No. 2,261.)

(Submitted April 9, 1906. Decided May 14, 1906.)

Ejectment—Public Lands—Proceedings in Land Office—Witnesses—Fraud—Findings.

Ejectment—Findings—Public Lands—Proceedings in Land Office—Preventing Witnesses from Testifying.

1. A finding of the district court, in an action in ejectment, that plaintiff had prevented defendant from producing a certain witness in the hearing of a contest, for the land in question, in the United States land office, was not supported by the evidence, which showed that plaintiff had brought the witness some distance to the place of hearing to testify for him, but upon inquiry found that he would not testify as expected, and therefore sent him home, saying that he did not want his opponent to get hold of him, a party not being under any obligation to reveal the existence of evidence to his adversary to his own detriment.

Same—Preventing Witnesses from Testifying—Evidence.

2. The district court committed error in finding in an action in ejectment, that plaintiff procured another to cause the arrest and imprisonment of two persons so as to prevent their evidence from being secured by defendant in a contest for the land in question, in the land office of the United States, where it appeared from the evidence that while plaintiff and the persons causing the arrest were intimate and were witnesses at the trial of the contest and at the trial of the persons arrested, there was nothing to show that plaintiff had instigated the arrest or that the motive of him who caused it was to aid plaintiff.

Same—Fraud—Conspiracy—Evidence—Findings.

3. Evidence in a suit to recover possession of certain land, that plaintiff and another were on a friendly footing and that the latter aided the former to establish his claim to the land in question in the United States land office, did not warrant the district court in finding that they had entered into a conspiracy to defraud the defendant of the land.

Same—Powers of Land Department—Review of Decisions.

4. If the officers of the federal Land Department, to which tribunal is confided the power to determine rights growing out of settlements upon the public lands, err in the interpretation of the law applicable to the facts presented, or a fraud is practiced by one claimant upon another, or fraudulent practices are resorted to by the officers themselves, by reason of which title is granted to a party not entitled thereto, their action may be reviewed and annulled by a court of equity; but for mere errors of judgment upon the weight of the evidence produced before them in a given case, the only remedy is by appeal to the proper officer of the department, and the rulings then made are final and conclusive upon all courts.

Same—Witnesses—False Testimony at Contest—Fraud—Courts—Immaterial Findings.

5. A finding made in an action in ejectment that plaintiff and other witnesses swore falsely at the trial of a contest in the federal land office over the land in question in the ejectment suit, is immaterial,

since in order to justify a court in interfering with a conclusion reached by that department, the fraud in respect to which relief was sought by defendant by way of equitable counterclaim, must have been extrinsic and collateral to the matter tried by it and not in a matter tried upon its merits and upon which the decision was rendered.

Public Lands—Settlement—Noncompliance with Law—Who may Complain.

6. Where the federal government is willing that one who obtained land from the public domain without strict compliance with the law and the rules of the Land Department, should retain it, the individual citizen has no right to complain.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by Catherine Kennedy, administratrix of the estate of Edward B. Kennedy, deceased, against William Dickie. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Mr. C. L. Harris, for Respondent.

When the government has parted with title to lands, and the party to whom it is awarded obtains the same against the rights of another by fraud and imposition, or where the officers of the Land Department when passing upon the rights of individuals to government land misconstrue the law applicable to the controversy, or misapply the law to the facts as found by them, courts will review the same and do justice to the parties. Courts also review the action and decision of the officers of the Land Department, where one party claims another obtained the land by false testimony; in such case (if that is all the wrong complained of), it must appear that the alleged false testimony was considered by such officers; that it influenced them in making the decision complained of; that the decision complained of is based upon such false testimony. In all other cases the decisions of the officers of the Land Department are final and cannot be reviewed by the courts. (*Johnson v. Towsley*, 80 U. S. (13 Wall.) 72, 20 L. Ed. 485; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Quinn v. Chapman*, 111 U. S. 445, 4 Sup. Ct. 508, 28 L. Ed. 476; *Sampson v. Smiley*, 80 U. S. (13 Wall.) 91, 20 L. Ed. 489;

Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Thornton v. Peery*, 7 Okla. 441, 54 Pac. 649; *Bertwell v. Haines*, 10 Okla. 469, 63 Pac. 702; *Estees v. Timmons*, 12 Okla. 537, 73 Pac. 303; *Jordan v. Smith*, 12 Okla. 703, 73 Pac. 308; *Baldwin v. Keith*, 13 Okla. 624, 75 Pac. 1124; *Wormouth v. Gardner*, 112 Cal. 506, 44 Pac. 806.) This court practically settled the law of this state in *Colburn v. Northern Pac. Ry. Co.*, 13 Mont. 476, 34 Pac. 1017; *Small v. Rakestraw*, 28 Mont. 413, 104 Am. St. Rep. 691, 72 Pac. 746; *Gebo v. Clark's Fork Coal Min. Co.*, 30 Mont. 87, 75 Pac. 859; *Murray v. Montana L. & M. Co.*, 25 Mont. 14, 20, 21, 63 Pac. 719; *Horsky v. Moran*, 21 Mont. 345, 53 Pac. 1064; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468.

The purchaser of a relinquishment acquires no right to the land, or any interest therein. No settlement rights are vested in the purchase of a relinquishment, whether it be that of an Indian or other person. (*Andrew Korbe*, 2 Land Dec. 133; *Wiley v. Raymond*, 6 Land Dec. 246; *Davis J. Davis*, 7 Land Dec. 560; *Gilmore v. Schriener*, 9 Land Dec. 269; *Bentley v. Bartlett*, 15 Land Dec. 179; *Tabot v. Ortin*, 15 Land Dec. 441; *Stone v. Cowles*, 13 Land Dec. 192; *Zaspell v. Nolan*, 13 Land Dec. 148; *Fosgate v. Bell*, 14 Land Dec. 439; *Neil v. Southard*, 16 Land Dec. 386; *Cullins v. Leonard*, 17 Land Dec. 412; *Etnier v. Zook*, 11 Land Dec. 452.)

It is a fundamental rule that land is not subject to filing or entry "until it has been surveyed and the plat thereof duly filed in the local land office." (*Helen M. Cameron*, 10 Land Dec. 195; *Allen v. Merrill*, 8 Land Dec. 221-207.) It has been said: "Ordinarily, the public lands are not deemed surveyed in contemplation of law until the survey is approved and becomes a record in the district land office." (*Lord v. Perrin*, 8 Land Dec. 539, citing the case of *Barnard v. Ashley's Heirs*, 18 How. 46, 15 L. Ed. 285; *Hiram Brown*, 13 Land Dec. 392; *Johnson v. Jamerson*, 19 Land Dec. 91.) Plats are not deemed filed until the expiration of the thirty days' notice required by official regu-

lations. (*Johnson v. Jamerson*, 19 Land Dec. 91; *Benson v. State*, 24 Land Dec. 272.)

While an Indian allotment is not an entry, it, however, segregates the land. (*Lewis Eggert*, 5 Land Dec. 311.)

When a relinquishment is filed in the local land office, the land embraced in the entry is restored to the public domain. Not so with a relinquishment of an allotment. Relinquishment in such case does not become effective until approved by the department. (*Spaulding v. Kinney*, 27 Land Dec. 150; *Stephen Green*, 29 Land Dec. 680.)

The judgment of the lower court should be sustained upon the proposition that the land office officials misconstrued the law applicable to the contest between the parties to this action, and misapplied the same to the facts as by them found. The judgment of the lower court was not only based upon the findings of fact, but upon review of the law as considered by the land office officials in the determination of the contest between Dickie and Kennedy. The court found that said officials had misconstrued the law and misapplied the same to the facts as by them found. (*Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Johnson v. Towsley*, 80 U. S. (13 Wall.) 72, 20 L. Ed. 485; *Sampson v. Smiley*, 80 U. S. (13 Wall.), 91, 20 L. Ed. 469; *Quinn v. Chapman*, 111 U. S. 445, 4 Sup. Ct. 508, 28 L. Ed. 476; *Small v. Rakestraw*, 28 Mont. 413, 104 Am. St. Rep. 691, 72 Pac. 746; *Colburn v. Northern Pac. Ry. Co.*, 13 Mont. 476, 34 Pac. 1017; *Gebo v. Clark's Fork Coal Min. Co.*, 30 Mont. 87, 75 Pac. 859.)

Messrs. Hathhorn & Groves, for Appellant.

The officers of the Land Department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon the public land, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to the case, or if fraud is practiced upon them, or they themselves are charged with fraudulent prac-

tices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties upon their decisions; but for mere errors of judgment upon the weight of the evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department. The ruling of the department on disputed questions of fact, made in a contested case, must be taken when the ruling is collaterally assailed, as conclusive. (*Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235; *Warren v. Van Brunt*, 19 Wall. 646, 22 L. Ed. 219; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; *Johnson v. Drew*, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88; *Silver Bow Min. etc. Co. v. Clark*, 5 Mont. 378, 5 Pac. 580; *Colburn v. Northern Pac. Ry. Co.*, 13 Mont. 476, 34 Pac. 1017; *Moore v. Northern Pac. Ry. Co.*, 18 Mont. 290, 45 Pac. 215; *Horsky v. Moran*, 21 Mont. 345, 53 Pac. 1064; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468; *Murray v. Montana Lumber Co.*, 25 Mont. 14, 63 Pac. 719.)

Consent of the Secretary of Interior to a relinquishment by an Indian of his allotment, when given, is retroactive in its effect, and relates back to the date of relinquishment. (*Lykins v. McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485; *Pickering v. Lomax*, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Ejectment. The purpose of the action is to recover the possession of the northwest quarter of the northwest quarter of section 35, and lot 5 of section 34, township 1 north of range 26 east of the principal meridian of Montana, situate in Yellowstone county.

The complaint is in the ordinary form, alleging title and right of possession in plaintiff and ouster by the defendant. After the action was commenced the plaintiff, E. B. Kennedy, died. The present plaintiff, his widow, was thereupon substituted as plaintiff in his stead. The answer admits that the said Kennedy was prior to his death vested with the legal title to the land in controversy, but alleges that he became so vested with the title by a patent from the United States government, in fraud of defendant's rights, and that defendant is the lawful owner and entitled to the possession thereof. It denies the ouster. It then proceeds to allege two equitable counterclaims, which set forth in detail the history of a contest between E. B. Kennedy, the deceased, and the defendant before the Land Department of the United States, which resulted in a decision that the former was entitled to a patent by virtue of his priority of settlement upon the lands in controversy, with others, as his homestead. The first alleges, in substance, that this decision was obtained by fraud, in that, though defendant was the prior settler, Kennedy entered into a conspiracy with one Steele and others for the purpose of defeating defendant's claim, and succeeded in accomplishing his purpose by use of false and perjured testimony to the effect that he himself was the prior settler, and by preventing the defendant from fully and fairly presenting his claim to the department, whereas in fact the defendant was the prior settler and, but for the wrongful conduct of plaintiff, would have been awarded patent. The second, referring to and adopting the allegations contained in the first and detailing the facts found by the officers of the Land Department, avers that these officers misconstrued the law applicable thereto, and awarded the patent to Kennedy, whereas upon a proper investigation and application of the law it should have been awarded to the defendant. It is demanded that the court decree plaintiff involuntary trustee of the legal title for defendant's benefit, and that she be compelled to execute to him a suitable conveyance.

The trial was had upon the issues presented by plaintiff's reply to these counterclaims, denying all the material allegations therein, and resulted in findings and a judgment in favor of the defendant. Plaintiff has appealed from the judgment and an order denying her motion for a new trial.

The following facts are gathered from the record: Prior to 1892, the lands in controversy were included in the Crow Indian reservation. On December 8, 1890, under authority of an Act of Congress approved September 25, 1890 (26 Statutes at Large, 468, c. 913), a treaty was negotiated with the Crow Indians, by the terms of which a portion of their reservation, including a part of the land in controversy, was ceded to the government. Among other exceptions provided for under the treaty, were allotments theretofore made to Indians in severalty, and selections made by any of them under prior treaties. The treaty was ratified by Congress by an Act approved March 3, 1891 (26 Statutes at Large, 989, c. 543). By subsequent negotiations this treaty was modified under authority of an Act of Congress approved July 13, 1892 (27 Statutes at Large, 121, c. 164). Thereupon the President by proclamation, on October 15, 1892 (27 Statutes at Large, 1034), declared that all lands ceded under the treaty were open to settlement, subject to the conditions, limitations, and reservations in section 34 of the Act of Congress approved March 3, 1891, and other laws applicable.

The plat of the township survey was filed in the local land office at Bozeman on August 7, 1895, and notice was published that entries could be made by homestead settlers after September 8, 1895. Prior to this time and on July 1, 1895, Kennedy made application to the land office at Bozeman to enter as a homestead lot 5, section 34, the north half of the northwest quarter of section 35, lot 7, and the southeast quarter of the southwest quarter of section 26, township 1 north, range 26 east. This application was not received because the plat of the survey had not then been filed in the office. All the land described in his application, except the north half of the

northwest quarter of section 35, had theretofore been allotted to a Crow Indian named High Nose. The application was accompanied by a relinquishment by High Nose, dated June 26, 1895, of his claim thereto. It had been approved by the local agent but not by the Interior Department. It was approved by the latter on October 12, 1895. Kennedy left his application in the office to be filed as soon as the plat should be received, paying the receiver the necessary fees. On September 9, 1895, Kennedy's entry was filed and allowed. On the following day the defendant made application covering the land in controversy. He found that he could not make the entry as to the conflicting portion, since this was covered by the entry of Kennedy. He thereupon filed contest as to this portion of Kennedy's entry, claiming priority of settlement.

Defendant contended at the hearing of the contest that he had settled on the northwest quarter of the northwest quarter of section 35, by erecting a tent thereon on April 27, 1895, and building a fence inclosing a part of this subdivision and also of lot 5 in section 26. He further contended that he had removed his family thereon on May 27th and that thereafter he had made his home there, having erected a dwelling and necessary outhouses. Kennedy's contention was that his first act of settlement was the erection of a tent on the northwest quarter of the northwest quarter of section 35, on May 24, 1895, and cleaning a portion of the surface, and that this was followed by the erection of a dwelling on the line between the northwest quarter of the northwest quarter and lot 5, into which he moved his family on May 29th and 30th where he had since resided. He further contended that his purchase of the •relinquishment of the Indian, High Nose, gave him priority of right over the defendant. As to the alleged settlement of the defendant, E. B. Kennedy further contended that the defendant went upon the land not as a settler, or with the intention of acquiring title by homestead entry, but under an agreement with the Indian, High Nose, and another by the name of Rivers, who had allotments in other portions of sec-

tion 26, under the terms of which he was to cultivate a portion of the land in both allotments and cut hay from other portions thereof, one-half of the product to be given to the Indians as consideration for his occupancy of their land. It was alleged that he built no new inclosure but merely repaired an old fence theretofore built by the Indians to protect their lands from the inroads of range stock, a portion of it having been put on the northwest quarter of the northwest quarter of section 35, because the division lines were not known.

On January 20, 1896, the local officers at Bozeman found that the defendant's first act of settlement was on May 27th. They sustained plaintiff's contention and dismissed the contest. The defendant then appealed to the commissioner of the land office at Washington. That officer, in an opinion dated November 30, 1896, after a review of the evidence, affirmed the decision of the local officers. On appeal to the Secretary of the Interior the decision was again affirmed. A subsequent application for a rehearing was denied. The commissioner on his review of the case found that the plaintiff was the prior settler and that he had the equities in his favor by reason of his purchase of the allotment of High Nose. At the hearing before the Secretary of the Interior, besides going into the whole case on the facts, the defendant contended that E. B. Kennedy's entry was void as to lot 5, section 34, because it was not open to settlement until the relinquishment of High Nose had been approved by the Interior Department, and as to the northwest quarter of the northwest quarter of section 35, because it had been made upon papers executed before any of the lands were subject to entry, and because the land included in the entry was in excess of one hundred and sixty acres. The Secretary affirmed the finding of the inferior officers that E. B. Kennedy was the prior settler on the northwest quarter of the northwest quarter of section 35, the portion not included in the High Nose allotment. Upon the questions of law presented by the contentions of the defendant, he held (1) that, as to the allotted land, though the entry was irregular, it was

under the circumstances not void; (2) that, though irregular, it was not void because made upon papers executed prior to the time entry could have been made, but was amendable so as to make it good; and (3) that it was not void because it covered more than one hundred and sixty acres.

These contentions, in the opinion of the Secretary, presented questions which the government only could raise and which could not be effectually urged by defendant, whose rights under his alleged settlement were inferior to those of Kennedy. As to the portion of the land embraced within the allotment of High Nose the conclusion was that both Kennedy and defendant were trespassers, but that defendant stood in no position to question the validity of E. B. Kennedy's settlement because made prior to the time the relinquishment became operative.

The evidence introduced at the trial in the district court consisted of a copy of the evidence submitted at the contest in the land office, supplemented by such other evidence of a cumulative and impeaching character as the parties could procure. Indeed, it was in the nature of a rehearing of the contest and differed in nowise from what it would have been had it taken place before the Land Department officers.

The district court found (1) that E. B. Kennedy prevented the defendant from producing one Shock as a witness and having his evidence heard at the contest in the land office; (2) that Kennedy caused one Warren Burton to be imprisoned during November, 1895, so that his evidence could not be obtained and used by the defendant; (3) that he likewise caused one John Miller to be imprisoned with a like result; (4) that Kennedy conspired with one Steele, the reservation farmer, and other persons, to defraud defendant of the land in controversy; (5) that Kennedy gave false testimony at the contest, in that he swore that the Indian, High Nose, was dead so that he could not produce him to corroborate his (Kennedy's) statement as to defendant's arrangement with High Nose and Rivers under which he entered upon the land, and as to his repair of the fence thereon; (6) that there was in

fact no fence on the land when defendant first occupied it; (7) that defendant did not enter upon the land or build any fence thereon or cultivate any portion thereof under agreement with High Nose and Rivers; (8) that defendant took up his residence on the land on May 27, 1895; (9) that E. B. Kennedy was not at that time residing on any part of the land and did not enter thereon at any time prior to May 29, 1895; (10) that patent was issued to Kennedy on March 17, 1903; (11) that defendant had resided continuously upon the northwest quarter of the northwest quarter of section 35, and a portion of lot 5, section 34, and cultivated portions of both from year to year; (12) that George A. Miller, Clarence Kirk, Lionel I. Hammond, Henry Heise, and Joseph Ziminski, Jr., examined as witnesses at the contest, had given false testimony in behalf of E. B. Kennedy before the officers at Bozeman and (13) that this false testimony and other testimony found to be false at the trial in the district court, influenced and controlled the officers of the Land Department in making their decision.

As conclusions of law the court held: (1) That E. B. Kennedy's entry, made upon papers executed on July 1, 1895, was void; (2) that the purchase of the allotment of High Nose by E. B. Kennedy gave him no preferential right of settlement; (3) that as to lot 5 of section 34, both E. B. Kennedy and the defendant were trespassers up to October 14, 1895, the date at which the relinquishment of High Nose became operative, since the said relinquishment was ineffective until approved by the Secretary of the Interior; (4) that, since the defendant was the prior legal settler, the officers of the Land Department misconstrued and misapplied the law to the facts found by them; (5) that E. B. Kennedy, at the time of his death, was holding the title to lot 5, section 34, and the northwest quarter of the northwest quarter of section 35, as involuntary trustee of the defendant, and that the plaintiff, his administratrix, was holding the same as his successor as such involuntary trustee; and (6) that the defendant was entitled

to a judgment requiring the plaintiff as administratrix of E. B. Kennedy, deceased, to convey to the defendant by deed the legal title to the land so described, upon his payment into court for the use and benefit of the estate of E. B. Kennedy, the reasonable value of the improvements placed by Kennedy on the lands, and upon his further payment for the same purpose of the sums of money paid by said Kennedy in making his entry and final proof for patent. These sums having been ascertained under a reference ordered for that purpose and paid into court, judgment was entered as heretofore stated in favor of defendant. Though requested to do so, the court refused to find that Kennedy procured any person or persons to give false testimony in his behalf at the hearing of the contest, or that Kennedy or his agents in any manner prevented defendant from fully presenting his case at said hearing.

The questions submitted for decision are: 1. Does the evidence justify findings 1, 2, 3, and 4; 2. Can the judgment be sustained upon the other findings of fact made by the court; and 3. Did the officers of the Land Department misconstrue and misapply the law to the facts found by them?

1. A careful examination of the record fails to reveal any substantial evidence to support the first four findings. The witness Shock was taken from Billings, Yellowstone county, near where the land in controversy lies, to Bozeman by Kennedy to testify in his behalf as to the fact of the existence of the Indian fence and its condition at the time of the defendant's alleged settlement. Upon inquiry of him, Kennedy found that he would not testify as it was thought. He thereupon paid him his expenses and sent him back to Billings, telling him that he did not want defendant to get hold of him. There is nothing to show that the defendant at that time knew anything of Shock, or what he would state, or that he could not have had his testimony had he so desired. Kennedy used no improper influence upon the witness. Unless it be the law that one party to a controversy is bound to discover witnesses to his adversary to his own detriment, then Kennedy did no

wrong in paying this witness and discharging him. We hold that Kennedy was in no wise bound to discover the existence of Shock, or to reveal to the defendant what Shock would testify to. At such hearings witnesses appear, if at all, voluntarily at the request of the party who pays their expenses. Kennedy was not required to use his influence to detain this or any other witness, or to pay his expenses for the advantage of the defendant.

After the contest arose, Burton and Miller were arrested by the federal authorities at the instance of Steele, the reservation farmer, for trespassing upon the reservation. They were committed for trial in the United States court at Helena. Both were indicted by a grand jury. Upon a trial Burton was convicted and fined, but Miller was acquitted. Both were in jail at Helena at the time of the hearing at Bozeman. Assuming that the evidence could not have been obtained by deposition, and that the defendant was not guilty of negligence in failing to procure it, there is nothing to show that Kennedy instigated their arrest or that the motive actuating Steele in procuring it was to aid Kennedy. Kennedy and Steele were intimate. Both were witnesses at the trial of Burton and Miller, as well as at the trial of the contest. But this fact, standing alone, furnishes no substantial ground for a finding that the two were engaged in a criminal conspiracy to procure a conviction of these witnesses and thus prevent the defendant from using their evidence. If it be a fact that they entered into and were partially successful in carrying out such a conspiracy, it was not established by anything in this record.

The same may be said of the fourth finding. Beyond the fact that Steele and Kennedy were friendly, and that Steele aided Kennedy in any way he could to establish his claim, there is no substantial proof that they expressly or impliedly agreed to defraud the defendant. While it does appear that Steele, at the instance of Kennedy, removed other persons from portions of the allotted land, he did not remove the defendant from his alleged claim, even though defendant was himself from

the time he made his settlement, according to his own admission, a trespasser upon lot 5 in section 34.

2. The remaining findings are, in our opinion, wholly immaterial. The court finds that Kennedy and the other witnesses named swore falsely at the trial of the contest, Kennedy as to the death of High Nose, and the other witnesses, as appears from an examination of their testimony, as to the arrangement between the defendant and the Indians High Nose and Rivers, and as to the ownership and character of the fence which defendant claims that he built as a part of his improvements.

The Land Department of the federal government is the tribunal specially designated by law to receive and consider the evidence and thereupon determine the rights growing out of settlements upon public lands, with a purpose to secure them to those who have complied with the laws regulating the disposition of them. If its officers err in the interpretation of the law applicable to the facts presented, or a fraud is practiced by one rival claimant upon the other by which the latter is deprived of his right, or if the officers themselves are chargeable with fraudulent practices which have resulted in their granting title to the wrong party, their action may be reviewed and annulled by a court of equity at the instance of the aggrieved claimant, and the wrongful holder of the title may be compelled to surrender it. But for mere errors of judgment upon the weight of the evidence produced before them in any case, the only remedy is by appeal from one officer to another of the department. Upon such questions their rulings are final and conclusive upon all courts whatsoever. These fundamental rules have been settled by many decisions of the supreme court of the United States and have frequently been recognized and applied by this court. (*Bagnell v. Broderick*, 13 Pet. (U. S.) 436, 10 L. Ed. 235; *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 20 L. Ed. 485; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Shepley v. Cowan*, 91 U. S. 340, 23 L. Ed. 424; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Silver Bow M. & M. Co. v. Clark*, 5 Mont. 378, 5 Pac. 570; *Colburn v. Northern Pac. R. R.*

Co., 13 Mont. 476, 34 Pac. 1017; *Moore v. Northern Pac. R. R. Co.*, 18 Mont. 290, 45 Pac. 215; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468; *Small v. Rakestraw*, 28 Mont. 413, 104 Am. St. Rep. 691, 72 Pac. 746.)

It is also as well settled by the adjudicated cases and text-writers that the fraud in respect to which relief will be granted in any case must have been practiced upon the unsuccessful party, with the result that he has been prevented from fully and fairly presenting his case for consideration. In short, the situation in the case must have been such that there has never been a decision in a real contest over the matter in controversy. The fraud must have been extrinsic and collateral to the matter tried by the department, and not in a matter tried upon its merits and upon which the decision was rendered. (*United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; *Thornton v. Peery*, 7 Okla. 441, 54 Pac. 649; *Cagle v. Dunham*, 14 Okla. 610, 78 Pac. 561.)

United States v. Throckmorton, *supra*, was a suit brought to set aside and declare void a confirmation by the board of land commissioners of private land claims of California, of a claim of one Richardson under a Mexican grant. The ground of the action was that the decision of the board had been obtained by fraud. The specific fraud alleged was that Richardson had obtained from Micheltorena, the former political chief of California under the Mexican government, a grant to the lands in controversy falsely and fraudulently antedated so as to impose on the commissioners the belief that it had been made at a time when Micheltorena had power to make it. It was alleged that perjured depositions were procured and filed along with the fraudulent grant. The court, in deciding the case, adopted the view, and correctly we think, that cases arising out of controversies over public lands and involving the validity of determinations of the officers of the Land Department, are governed by the principles applicable to ordinary suits in equity brought

to set aside judgments obtained by fraud. It states the general rule thus:

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So, in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society (*interest reipublicae ut sit finis litium*) is not violated. But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, (by) a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. * * * On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evi-

dence, or for any matter which was actually presented and considered in the judgment assailed."

In *Vance v. Burbank*, *supra*, it is said in the same connection: "The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are. It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party and prevented him from exhibiting his case fully to the department, so that it may properly be said that there has never been a decision in a real contest about the subject matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal."

Again, in *Quinby v. Conlan*, *supra*, the court through Mr. Justice Field said: "For mere errors of judgment, as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties. In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department, is negatived by the finding of the court. It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can,

in proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. * * * And we may also add in this connection, that the misconstruction of the law by the officers of the department, which will authorize the interference of the court, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them."

The rule applicable is thus stated by Mr. Herman in his work on Estoppel and Res Judicata: "Sec. 395. In every litigated case where the interests involved are large there is generally conflicting evidence. Witnesses looking at the same transaction from different standpoints give different accounts of it. The statements of some are unconsciously affected by their wishes, hopes or prejudices. Some, from defective recollection, will blend what they themselves saw or heard with what they have received from the narration of others. Uncertainty as to the truth in a contested case will thus arise from the imperfection of human testimony. In addition to this source of uncertainty may be added the possibility of the perjury of witnesses and the fabrication of documents. The cupidity of some and the corruption of others may lead to the use of the culpable means of gaining a cause. But every litigant enters upon the trial of a cause knowing not merely the uncertainty of human testimony when honestly given, but that, if he has an unscrupulous antagonist, he may have to encounter fraud of this character. He takes the chances of establishing his case by opposing testimony, and by subjecting his opponent's witnesses to the scrutiny of a certain cross-examination. The case is not the less tried on its merits, and the judgment rendered is none the less conclusive, by reason of the false testimony produced. Thus, if an action be brought upon a promissory note, and issue be joined on its execution, and judgment go for the plaintiff, and there is no appeal, or if an appeal be taken and the judgment be affirmed, the judgment is conclusive between the parties, although, in fact, the note

may have been forged, and the witnesses who proved its execution may have committed perjury in their testimony. The rules of evidence, the cross-examination of witnesses, and the fear of criminal prosecution with the production of counter-testimony, constitute the only security afforded by law to litigants in such cases. A court of equity could not afterward interfere upon an allegation of the forgery and false testimony, for that would be to reopen the case to a trial upon the execution of the note, which had already been *sub judice* and passed into judgment." The following cases illustrate application of the rule: *Kent v. Ricards*, 3 Md. Ch. 392; *Wierich v. De Zoya*, 2 Gilm. (Ill.) 385; *De Louis v. Meek*, 2 G. Greene (Iowa), 55, 50 Am. Dec. 491; *Pearce v. Olney*, 20 Conn. 543; *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320; *Ross v. Wood*, 70 N. Y. 8; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336. (See, also, *Hukm Chand on Res Judicata*, sec. 489 et seq.)

In the case at bar the fraud upon which the court permitted the defendant to recover is inferred from the fact that false testimony was given at the contest as to the character of the defendant's entry upon the land in controversy. As we have seen from an examination of the cases cited, this is not such fraud as will justify the interference of a court of equity. The possibility of the presence of perjury at any controversy in courts is always to be anticipated, and when a party is awarded a trial, he must be prepared to meet and expose it then and there. The very object of the trial is to ascertain the truth from conflicting evidence, and necessarily the result of the investigation is a determination of the truth or falsity of the story of every witness who has testified. The trial is the complaining party's opportunity to make the truth appear, and if he fails, being overborne by perjured testimony, he is unfortunate but nevertheless without remedy. (*Pico v. Cohn*, *supra*.) This seems to be a harsh rule, but any other would promote endless litigation and open the door to even greater fraud by encouraging litigants to attempt to set aside judgments after the evidence upon which

they rest has been destroyed or lost by lapse of time. The cases of *Pico v. Cohn*, *Smith v. Lowry* and *Ross v. Wood*, *supra*, are directly in point and we think state the correct rule.

Under the rule established by the authorities, although the finding that Kennedy and his witnesses swore falsely at the contest at Bozeman be ever so well established by the proof, nevertheless it is wholly immaterial and does not warrant the judgment of the district court. Nor does the fact that the court found upon the evidence that the settlement of defendant was prior to that of Kennedy.

But, conceding the rule to be that a judgment may be overturned on the ground alleged, the allegations and proofs offered must be something more than a mere rehearing upon substantially the same case submitted at the hearing which resulted in the judgment complained of. Here nothing is presented for determination other than the question decided by the Land Department, to-wit: the truth of the statements of the witnesses who testified at the hearing. It is true that some additional witnesses testified in the district court, but their testimony was entirely cumulative and impeaching in character, and upon this feature of the case the findings and judgment of the district court are the result of a different conclusion reached upon practically the same facts submitted to the Land Department. Said Mr. Justice Field in *Lee v. Johnson*, *supra*: "A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence."

3. Nor do we think that the officers of the Land Department misconstrued or misapplied the law to the facts found by them. The determinative fact found was the priority of Kennedy's settlement. So far as concerns his entry upon the northwest quarter of the northwest quarter of section 35, it was lawful. The finding that he was there first was binding upon the district

court, even though, if the matter had been submitted as an original question, that court might have found otherwise, as it did. This fact having been established, the decision of the department that the record entry made at the land office was not void but amendable, did not prejudice the defendant in any way, for it did not deprive him of any right. Under the circumstances he had no right of entry, and the condition of the record was for this reason a question solely for the government, and if these officers wrongly decided it, this fact furnished no ground for complaint by defendant. The individual citizen has no right to complain if the government is willing that Kennedy's heirs retain the land which he obtained without strict compliance with the law and the rules of the department. Nor does it matter that the entry was not in fact amended by the local officers, as was suggested by the Secretary of the Interior in his opinion.

For the same reason the defendant cannot complain of the decision that the entry was not void for that Kennedy was a trespasser upon lot 5, section 34, or that he had superior equities by reason of his purchase of the High Nose allotment. Whether this latter conclusion was reached by ignoring the trespass or upon the theory that his occupancy of the allotment, originally wrongful, was made good from its inception by relation, by the approval and recognition of the relinquishment on October 14, 1895, it furnishes the defendant no ground to complain. In any event, if Kennedy's occupancy of lot 5, section 34, was wrongful, the defendant cannot be heard to say that his alleged occupancy was of any higher character. But however this may be, the disposition of this matter was for the government, and defendant has no ground to complain that an oversight on the part of the officers of the government deprived him of any right, when, as a matter of fact, he had no right.

The district court, we think, was in error in deciding the case as it did. At the close of defendant's evidence the plaintiff requested the court to find in her favor. This it should have done,

since the defendant did not make out a case upon which he was entitled to recover.

The judgment and order are, therefore, reversed, and the cause is remanded to be proceeded with in accordance with the suggestions herein.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, not having been present at the argument, takes no part in this decision.

Rehearing denied, June 16, 1906.

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124 307

STATE EX REL. EAKINS, RELATRIX, v. DISTRICT COURT OF
THE SECOND JUDICIAL DISTRICT ET AL., RESPOND-
ENTS.

(No. 2,305.)

(Submitted April 21, 1906. Decided May 14, 1906.)

*Certiorari—Probate Proceedings—Special Administrators—
Guardian Ad Litem—Public Administrators—Statutes—Dis-
trict Courts—Jurisdiction.*

Public Administrators—Probate of Wills—Objections.

1. The public administrator has not any interest in an estate which entitles him to object to the probate of a will.

Wills—Special Administrators—Guardians *Ad Litem*—Appointment—Statutes—District Courts—Jurisdiction.

2. Section 2500 of the Code of Civil Procedure provides for the appointment of a special administrator where there is delay in granting letters testamentary by reason of any legal cause. The district court in a probate proceeding appointed a guardian *ad litem* for two minor heirs, who thereupon filed objections to the probate of the will and prayed for the appointment of a special administrator pending the hearing of the petition for letters and objections thereto. The public administrator was appointed as such special administrator. *Held*, on *certiorari*, to annul the order, that section 574 of the same Code, providing for the appointment of a guardian *ad litem*, has reference to civil actions, as distinguished from probate proceedings, which latter fall under the designation of "Special Proceedings of a Civil Nature";

that section 2925 of that Code relative to the appointment of a competent attorney to *represent* minor heirs who have no general guardian, at hearings of petitions and contests for the probate of wills, etc., is exclusive and applicable only to probate proceedings; that for this reason the minors could not appear by guardian *ad litem* in opposition to the probate of the will; that, therefore, his objections did not furnish any legal cause for delay which made the appointment of a special administrator necessary, and, hence, that the district court was without jurisdiction to make the order complained of.

Special Administrators—Preference to Appointment—Public Administrators.

3. Where there exists a legal cause for the appointment of a special administrator, the district court must, under section 2502 of the Code of Civil Procedure, appoint some one entitled to such appointment; and the selection of a public administrator to act as such officer, in preference to the widow of decedent who had been named as legatee and devisee in the will and as executrix thereof, was a violation of the provisions of the statute.

Special Administrators—Appointment—Objection—Waiver—District Courts—Jurisdiction.

4. The mere fact that the widow of testator asked that she be appointed special administratrix of the estate of decedent, when a legal cause for the appointment of such officer did not exist, did not estop her to object to the appointment of another, or confer jurisdiction upon the court to appoint another.

ORIGINAL application by the state, on relation of Mary A. Eakins, for writ of review to annul an order of the second judicial district court, Honorable Michael Donlan, a judge thereof, presiding, made in a probate proceeding. Order annulled.

Mr. W. A. Pennington, and Mr. J. H. Duffy, for Relatrix.

Mr. M. F. Canning, and Mr. J. E. Healy, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On January 31, 1906, John Eakins died in Silver Bow county, leaving an estate therein and leaving a will by the terms of which Mary A. Eakins, this relatrix, is named, as wife of decedent, as legatee and devisee in the will and as executrix of the will. The other legatees and devisees are two minor sons and two adult sons of the deceased.

On February 14th, the relatrix presented to the district court a petition asking for the probate of the will and her appointment as executrix. Notice of the hearing of the petition was

given for February 26th, on which last-named day the public administrator of Silver Bow county, John B. O'Reilly, filed written objections to the probate of the will and asked that he be appointed administrator of the estate. Thereupon the court continued the hearing of the petition and the objections thereto by the public administrator to March 3d, on which last-named day the court again continued such hearing to March 10th, and on its own motion appointed John B. O'Reilly special administrator of the estate; but upon application to this court the last order was annulled. On March 10th the hearing of the petitions and objections was again continued to March 31st. On April 9th, the court, sitting as a court of probate, appointed M. C. Whitney guardian *ad litem* of the minor heirs, and on the same day such guardian *ad litem* filed written objections to the probate of the will, and prayed that a special administrator be appointed pending the hearing of the petition and objections thereto. On the same day the court made an order again appointing John B. O'Reilly special administrator of the estate. Thereupon application was made to this court to review the order appointing O'Reilly special administrator.

The only authority which a district court has for appointing a special administrator is found in section 2500 of the Code of Civil Procedure, which reads as follows: "When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended or removed, the court or judge must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate." Of course, the phrase "from any cause" means from any legal cause. The only cause for any delay whatever in this instance was the filing of the objections by the guardian *ad litem* and the court's consideration of such objections. The court appears properly

to have refused to consider the objections of the public administrator after this court annulled the order appointing him special administrator. The public administrator has not any interest in an estate which entitles him to object to the probate of a will. (Code Civ. Proc., sec. 2329; *In re Sanborn's Estate*, 98 Cal. 103, 32 Pac. 865.) Confessedly, if the court had refused to consider the objections made by the guardian *ad litem*, there was not anything to prevent immediate consideration of the petition for the probate of the will.

Did the filing of the objections by the guardian *ad litem* furnish legal cause, or any cause, for delay? The provisions of law relating to the appointment of a guardian *ad litem* are found in section 574 of the Code of Civil Procedure. Those provisions and the provisions of section 575 are a part of Title III, Part II, of the same Code. Part II is entitled "Civil Actions," and Title III thereof is entitled "Parties to Civil Actions." Probate proceedings comprise Title XII of Part III, same Code, and Part III is entitled "Special Proceedings of a Civil Nature." Section 2925 is one section of Title XII, Part III, above, and is as follows: "At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmation thereof; settlements, partitions and distributions of estate, setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof; the court or judge may, in its or his discretion, appoint some competent attorney at law to represent in all such proceedings the devisees, legatees or heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are nonresidents of the state; and those interested, who, though they are neither such minors or nonresidents, are unrepresented. * * *"

These provisions of this last section are special, are applicable only to probate proceedings as distinguished from civil actions or other special proceedings of a civil nature, and must be held

to be exclusive. This is the conclusion reached by the supreme court of California and the supreme court of the United States. Sections 372 and 1718 of the California Code of Civil Procedure contain the same provisions as our sections 574 and 2925, above, respectively, and, construing them, the supreme court of California in *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174, said: "The last ground is the one upon which the counsel for respondents rely. The position is based upon the proposition that the provisions in relation to guardians *ad litem* in the chapter on 'parties to civil actions' apply to probate proceedings. But, in the first place, we do not think that the provisions referred to apply to probate proceedings. It has been held that for some purposes probate proceedings are not 'civil actions.' (*Estate of Scott*, 15 Cal. 220; *Ex parte Smith*, 53 Cal. 204.) And we do not think they are to be considered civil actions or proceedings within the meaning of said provisions. If these general provisions were intended to apply to probate proceedings, what was the use of making special provisions in reference to the appointment of attorneys for minors in such proceedings? Is it not to be inferred that the special provisions were put in because the general ones were not intended to apply? This inference is strengthened when the provisions are considered together. The thing which a guardian *ad litem* is appointed to do is to 'represent' the infant in the action or proceeding (Code Civ. Proc., sec. 372), by which we understand that he is to conduct and control the proceedings on behalf of the infant. Now, the attorney for minors in probate proceedings is to 'represent' the minor (Code Civ. Proc., sec. 1718), and, so far as he is concerned, to conduct and control the proceedings; so that, if the general provisions apply, it would be possible to have two representatives of the minor in the same contest, neither of whom would be subordinate to the other. We do not think such a result could have been intended."

This decision is referred to and approved by the supreme court of the United States in *Robinson v. Fair*, 128 U. S. 53, 9

Sup. Ct. 30, 32 L. Ed. 415, wherein it is held that section 372 of the California Code of Civil Procedure, or our own section 574 above, refers to civil actions as distinguished from probate proceedings, and that section 1718 of the California Code of Civil Procedure, or our own section 2925 above, controls in probate matters. We think the conclusion reached in these cases correct, and that the minors could not appear by guardian *ad litem* in opposition to the probate of the will.

Under this view of the matter, then, it was the duty of the district court to strike from the files the objections made by the public administrator and the so-called guardian *ad litem*, and proceed to hear and determine the petition for the probate of the will. If these objections had been stricken from the files or wholly disregarded, as they should have been, there was not then any legal cause, nor any cause, for delay. And if there had been any legal cause for appointing a special administrator, the court directly violated the provisions of section 2502 of the Code of Civil Procedure in appointing the person whom it did appoint, in preference to others first entitled to such appointment. But so far as this record shows, there was not any cause whatever for the appointment of a special administrator, and, in the absence of legal cause, the district court did not have jurisdiction to make the appointment of which complaint is made. (*In re Ming*, 15 Mont. 79, 38 Pac. 228.)

But it is said that, as this relatrix asked that she be appointed special administratrix pending the hearing of the petition for probate of the will, she cannot complain that the court appointed O'Reilly. But, if the court did not have jurisdiction to appoint anyone to such office, then nothing that this relatrix did could confer such jurisdiction. In point of law, there was not anything before the district court, except the petition for the probate of the will, and in appointing O'Reilly special administrator the district court acted without any legal cause appearing why such appointment should be made, and, therefore, exceeded its jurisdiction.

The order of the district court made April 14, 1906, appointing John B. O'Reilly special administrator of the estate of John Eakins, deceased, is annulled. *Remittitur* forthwith.

Order annulled.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE MILBURN: I concur. A grand jury, commenting on probate matters in this state about fifteen years ago, in its report to the court said: "Administration of estates is spoliation of estates." As it is always the property of the widow and children, or both, of the deceased person which pays the lawyers, executors, administrators, appraisers et al., and the size of the fees in most cases is fixed by the court, frequently with extra allowances for "extraordinary services," the courts should be anxious and very careful to limit the number of lawyers and other officers to the fewest possible in number, and should not appear to insist on appointing self-seeking persons to lucrative positions. In this case there seems to me to be undue persistency on the part of citizen O'Reilly in demanding that he be allowed to serve (not merely as public administrator, even if in his public capacity he may properly appear, which, as shown in Mr. Justice Holloway's opinion, he may not properly do). I think that our former determination of this matter ought to have been conclusive.

The district judge, sitting in probate proceedings, is the representative of the dead person, his creditors, if any, and of the orphan, rich or poor, and of the law made for the protection of the sometimes helpless, and should, in the exercise of his solemn duty and of his own motion, oppose all efforts of strangers to profit by the death of the head of the family or of anyone else. The district court should be earnest, active, anxious and solicitous in all matters connected with the estate of deceased persons, and in dealing with the helpless children, with the intent to save as much as possible of the assets for those to whom they belong. He should not be complacent in dealing with people who are desirous of increasing the number of aids, as-

sistants, counsel, administrators et al., the employment of many of whom often almost, or entirely, swamps the estate. The court also should see to it that estates are settled as soon as possible, thus avoiding expense running over too long a time.

STATE EX REL. PEW, RELATOR, v. DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT ET AL., RESPOND-
ENTS.

(No. 2,306.)

(Submitted May 5, 1906. Decided May 14, 1906.)

*Certiorari—Water Rights—Injunction—District Courts—Juris-
diction—Due Process of Law—Contempt.*

Water Rights—District Courts—Contempt.

1. The proper way for a district court to enforce its order theretofore made adjusting water rights between claimants entitled thereto is by contempt proceedings, upon the filing of an affidavit showing a disregard of the order.

Certiorari—Water Rights—Injunction—District Courts—Jurisdiction—Due Process of Law.

2. *Held*, on *certiorari*, that the district court exceeded its jurisdiction in making an order, in a summary proceeding and with notice of less than twenty-four hours, which to all intents and purposes enjoined a person from interfering with certain water rights theretofore adjusted between various claimants in an action to which the person so enjoined was not a party; that, if a trespasser, injunction against him could only be had after a hearing in a regular action; and that the adjudication of his rights as made by the order was without due process of law.

ORIGINAL. *Certiorari* by the state, on relation of George H. Pew, against the district court of the first judicial district in and for the county of Lewis and Clark, and Honorable Henry C. Smith, judge of department 1 thereof, to review an order enjoining relator from using the waters of a creek for irrigation purposes. Order annulled.

34	233
38	208

Mr. Chas. E. Pew, and Mr. C. B. Nolan, for Relator.

Messrs. Galen & Mettler, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari. In May, 1903, in a cause entitled "*William Allen Butler and Wilhelmus Mynderse v. Thomas Cassidy et al.*," the district court of Lewis and Clark county made and entered a final decree settling and adjudicating the rights of all the parties to the use of the waters of Silver creek, in that county, and declaring their relative priorities. Among the other rights so adjudicated is one owned jointly by the plaintiffs and S. S. Johnson, one of the defendants, consisting of fifty inches, statutory measurement. The relator was not a party to the action, but being the tenant of plaintiffs, interested himself therein as their representative, and was active in their behalf. The decree contains this provision: "(2) And it is further ordered that each and every one of the parties to this action, his, her, or their heirs, assigns, lessees, tenants, subtenants, claimants, or occupiers of said several rights, their agents, servants, employees, legal or other representatives, be, and they are, hereby perpetually enjoined from in any wise invading, encroaching, or infringing upon or interfering with the rights of any and all of the other of said parties as the same are quieted and settled by this decree."

On April 16, 1906, Johnson filed in that cause in the district court the following affidavit: "S. S. Johnson, being duly sworn, says: That he is the owner of a joint water right with plaintiff of fifty inches of waters of Silver creek involved in the decree in this action; that ever since the opening of the season of 1906, one George H. Pew has persistently taken all of said water right, including the waters of this affiant, and when this affiant has gone to the head of the ditch to get his share of the water, the said Pew would always take the whole of the same immediately upon the return of this affiant to his home."

The court thereupon issued and had served an order requiring the relator to show cause at 4 o'clock that day why an order should not be made providing for the use of said joint water right by the owners thereof at different periods, respectively, so as not to interfere with each other, and why such further order should not be made in the premises as to the court might seem proper. After a hearing the following order was entered:

"This matter came on regularly for hearing before the court on the affidavit of S. S. Johnson, and the order to show cause heretofore issued. George H. Pew appeared in open court personally and by counsel. Whereupon S. S. Johnson, George S. Fryatt and W. H. Barnes appeared and gave testimony for the affiant, and the said George H. Pew testified in his own behalf, whereupon the court makes the following findings of fact: 1. That while the said George H. Pew disclaims any further interest or present interest in the plaintiffs' water right, he has for the last thirty days, under some absolutely unfounded claim, taken all of the waters of the said joint right of the plaintiffs and the said defendant S. S. Johnson, and in addition thereto a great volume of other water belonging to other water users on said creek from Silver creek, to none of which the said Pew has any title or any right thereto. And it further appearing that the said plaintiffs and their lessees have passively allowed the said Pew to use all of said joint water right without protest and that the said S. S. Johnson has been deprived of his share of the same for the last thirty days, it is ordered that the said Johnson be, and he is hereby, given the right to use the whole of said joint right of fifty inches heretofore decreed to himself and the plaintiffs, continuously up to and including the morning of May 16, 1906, and that thereafter the plaintiffs may use the same until the twenty-third day of May, 1906, at 8 o'clock A. M. exclusively, and that thereafter the defendant, S. S. Johnson, and the plaintiffs shall use the said joint right respectively, alternately, week in and week out, commencing as aforesaid, until the further order of this court. And it is further ordered that the said George H. Pew be, and he is here-

by, restrained and prohibited from directly or indirectly, personally, or through his servants or employees, or in any other manner using any of the waters of Silver creek, for irrigation purposes or otherwise." Thereupon this proceeding was brought in this court to have the order annulled.

The proceedings resulting in the order made by the court were anomalous. The decree in the case of *Butler et al v. Cassidy et al.* does not provide in terms how the right in controversy shall be used. It merely adjudges that the plaintiffs are entitled to a one-half interest and that Johnson is entitled to the other half interest. Though all the parties to the action, including their heirs, assigns, lessees, tenants, etc., are perpetually enjoined from in any manner invading or interfering with the rights of any of the other parties, there is no specific provision regulating the rights of the plaintiffs and the defendant Johnson, as between themselves, in the use of their joint right. But whatever may be the rights of these parties under the decree, and whatever may be its provisions adjusting their rights as between themselves, it is clear that the order complained of is in excess of jurisdiction.

If the relator had such connection with the litigation by which the rights of the parties were adjusted, as to make the decree binding upon him, the proper way for the court to enforce it was by contempt proceedings. The affidavit does not charge a contempt. It appears from the order made, that the relator disclaims any further interest in the plaintiffs' water right by virtue of a tenancy or any other relation. The court evidently proceeded upon the theory that he was a trespasser interfering with the rights of the parties as they had been settled and determined by the decree, and that the making of the order would restrain Pew from interfering in any way any further. However this may be, the order amounts to an independent injunction issued in the case, restraining Pew from interfering with any of the waters of Silver creek, no matter whether by a claim of some independent right not adjudicated in the decree, or as a mere trespasser without claim of any right. At the close of the hear-

ing the relator found himself enjoined from interfering with or using in any way any of the waters of the creek. In other words, the court adjudged that he was engaged in committing a trespass, and enjoined him in a summary proceeding, in a cause in which he was not a party, or, upon the theory that he claimed an independent right, finally and absolutely adjudicated that he had no such right, and that, too, upon summary notice of less than twenty-four hours. From either point of view the court had no jurisdiction. If the relator was a trespasser, he could be enjoined only after a hearing in a regular action, brought in the usual way. So, if he claimed an independent right, he was entitled to a regular hearing in an action brought for the purpose of adjudging his right. As it is, his rights were adjudged without due process of law.

There being no appeal from the order, nor any other adequate remedy than by *certiorari*, relator is entitled to a judgment annulling the order complained of. The order is accordingly annulled.

Order annulled.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing decision.

DONOVAN-McCORMICK COMPANY, APPELLANT, v. SPARR,
RESPONDENT.

(No. 2,262.)

(Submitted April 9, 1906. Decided May 14, 1906.)

*Money Paid—Instructions—Appeal—Record—Presumptions—
Burden of Proof—Proving Negative.*

Money Paid—Liability of Defendant—Instructions.

1. In an action to recover a sum of money alleged to have been paid by plaintiff for the use and benefit of defendant in the purchase of certain stock, a requested instruction that if the jury believed that the plaintiff had purchased the stock for defendant, the latter was

bound to pay for it, was erroneous, since, in order to fasten liability upon him, a request, express or implied, on his part, for such purchase must have been shown.

Appeal—Record—Evidence—Instructions.

2. In the absence of the evidence from the record on appeal, instructions, to be subject to review, must have been erroneous under any conceivable state of facts presented at the trial.

Appeal—Record—Absence of Evidence—Pleadings—Presumptions.

3. Every reasonable presumption will be indulged in favor of the action of the trial court; and in the absence of the evidence from the record on appeal, it will be presumed that instructions were warranted by the interpretation of the pleadings acted upon by the parties, and by the evidence in the case, unless the contrary appears.

Money Paid—Issues—Instructions.

4. The complaint, in an action for money paid, alleged that the plaintiff corporation purchased certain shares of stock for the defendant at his special instance and request and that he agreed to pay for them. Defendant interposed a general denial. The court submitted an instruction telling the jury, among other things, that a question for their determination was as to whether the plaintiff company had purchased the stock for itself. The record on appeal did not contain the evidence. *Held*, that the giving of this instruction did not present a new issue, because, under his general denial, the defendant might have presented evidence to show that the plaintiff had purchased the stock for its own use and benefit.

District Courts—Instructions—Theory of Case.

5. The district court, in charging the jury, may not disregard the theory of the case at issue entertained by either party.

Money Paid—Instructions—Burden of Proof—Proving Negative.

6. An instruction, given in an action to recover money alleged to have been paid for the use and benefit of defendant in the purchase of certain shares of stock, which told the jury that the burden of proving that it did not buy the stock on its own account was upon the plaintiff corporation, while not to be commended as a mode in which to present a question in controversy to the jury, may not be said, in the absence of the evidence from the record, to impose upon plaintiff any greater burden than that which would have been imposed had the jury been informed that the burden was upon plaintiff to show that the stock was purchased for defendant, since proof of either alternative disproved the other.

Conflicting Instructions—When Harmless Error.

7. The giving of two conflicting instructions, one of which correctly stated the law while the other was erroneous, but in appellant's favor, does not constitute reversible error.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by the Donovan-McCormick Company against Charles W. Sparr. From a judgment in favor of defendant, plaintiff appeals. **Affirmed.**

Messrs. Walsh & Newman, and Mr. W. M. Johnston, for Appellant.

The error in instructions 6, 7, 9, 10 and 11 is that they introduced an issue which was not presented by the pleadings or involved in the case, and the jury were thereby misled to the prejudice of the plaintiff.

It is a well-established principle and rule of procedure that the instructions must be warranted by the pleadings and evidence. Primarily, they must be warranted by the pleadings, because the evidence must correspond with the pleadings. This has been decided by the supreme court in many cases. (*Thornton-Thomas Co. v. Bretherton*, 32 Mont. 99, 80 Pac. 10; *Yoder v. Reynolds*, 28 Mont. 195, 72 Pac. 417; *Goodkind v. Gilliam*, 19 Mont. 388, 48 Pac. 548; *Walsh v. Mueller*, 16 Mont. 180, 40 Pac. 292; *Purtile v. Casey*, 11 Mont. 229, 28 Pac. 305; *Kinna v. Horn*, 1 Mont. 329; 11 Ency. of Pl. & Pr. 159; *Chicago B. & L. Ry. Co. v. Clinebell* (Neb.), 99 N. W. 839; *Gulf C. & S. F. Ry. Co. v. Scott* (Tex. Civ. App.), 27 S. W. 827; *Frederick v. Kinzer*, 17 Neb. 366, 22 N. W. 770; *Reed v. Gould*, 93 Mich. 359, 53 Pac. 356; *Barrett v. Wheeler*, 66 Iowa, 560, 24 N. W. 38.) So in this case, the issue presented was that the defendant purchased the stock, and the plaintiff paid for it at his request, and that he agreed to repay the plaintiff. No issue was presented that the plaintiff purchased the stock, to be held as treasury stock, to be disposed of as the board of directors should order. (*Beck v. Trimble*, 14 Colo. App. 195, 59 Pac. 412; *Coos Bay R. & E. & N. Co. v. Siglin*, 26 Or. 387, 38 Pac. 192; *Dennan v. Johnston*, 85 Mich. 387, 48 N. W. 565. See, also, *Gilmore v. Swisher*, 59 Kan. 172, 52 Pac. 426; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089; *Holt v. Pearson*, 12 Utah, 63, 41 Pac. 560; *Thorwegan v. King*, 111 U. S. 549, 4 Sup. Ct. 529, 28 L. Ed. 514; *McCreedy v. Phillips*, 63 N. W. 7; *Pearson v. Dryden*, 28 Or. 350, 43 Pac. 166; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430; *St. Louis etc. Ry. Co. v. Blinn*, 10 Kan. App. 468, 62 Pac. 427; *Morrow v. St. Paul City Ry. Co.*, 67 N. W. 1002; *Fortiscue v. Crawford*, 10 S. E. 910; *Missouri K.*

& *T. Ry. Co. v. Wickham*, 28 S. W. 917; *Hammond v. King*, 92 N. W. 1031; *Frick v. Kabaker*, 90 N. W. 498; *Barry v. Graciette*, 71 S. W. 307; *Perey v. S. A. & A. P. Ry. Co.*, 67 S. W. 137; *Moffatt v. Conklin*, 35 Mo. 453; *Christian v. Connecticut etc. Ins. Co.*, 143 Mo. 460, 42 S. W. 268; *Easterly & Son v. Van Slyke*, 21 Neb. 611, 33 N. W. 209.)

Mr. O. F. Goddard, and *Mr. T. J. Walsh*, for Respondent.

The appellant asserted that the respondent bought the stock. He retorted that he did not, that the appellant bought it. The appellant declared that it paid for stock for the respondent, and at his request. He answered that it did not; it paid its own obligation. Evidence to show that it was the appellant that bought the stock, that the obligation was its, not the respondent's, is not evidence in support of an affirmative defense. It is contradictory of the averments of the complaint that the appellant bought the stock and that it paid for it for him, for his accommodation and at his request. If the respondent had added to his answer averments to the effect that the stock was in fact bought from Donovan by the appellant for its own use and that the payment of the money was made by it in discharge of its own obligation, they would be subject to be stricken out as redundant. (Pomeroy's Code Remedies, 682.) Such averments would not be "new matter"; they would simply be affirmative denials. "New matter" calling for a reply confesses and avoids the plaintiff's cause of action. (1 Ency. of Pl. & Pr. 832.) It concedes that a cause of action once existed. (*Hogen v. Klabo* (N. Dak.), 100 N. W. 847-849; Pomeroy's Code Remedies, 673, 674, 682; *Jones v. Rush*, 156 Mo. 364, 57 S. W. 118. See, also, *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409; *Meyendorf v. Frohner*, 3 Mont. 282.) These cases hold, in effect, that under a general denial of the plaintiff's title, the defendant may show title in himself, and for the very plain reason that such evidence contradicts the assertion of the plaintiff that he is the owner. (*Staubach v. Rexford*, 2 Mont. 565; *Dayhoff v. International etc. Ry. Co.* (Tex. Civ. App.), 26 S. W. 517; *Wiedeman v.*

Hedges, 63 Neb. 103, 88 N. W. 170.) The respondent was plainly entitled to show, under the denials in the answer, that the stock was bought by the appellant itself, and thus refute the allegation that it was bought by the defendant and his associate stockholders.

Appellant suffered no injury by any conflict in instructions 9 and 14. (*Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114.)

Whatever ground of complaint the respondent might have had, on account of any conflict in these instructions, were the verdict against him, the appellant has none, the error, if error is found in them, being in its favor. (*Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61; *Williams v. Southern Pac. Ry. Co.*, 110 Cal. 457, 42 Pac. 974; *Alexander v. Clark*, 83 Mo. 481-488.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Donovan-McCormick Company brought this action to recover from the defendant Sparr the sum of \$5,049.31, alleged to have been expended by the company for the use and benefit of Sparr and at his special instance and request.

The complaint alleges that T. C. Power, Paul McCormick, A. C. Johnson, and defendant Sparr purchased two hundred shares of the capital stock of the plaintiff company from W. H. Donovan for \$20,197.23; that such stock was transferred to Paul McCormick, trustee, to be held for the parties named, in the following proportions: Power, fifty-six and one-quarter shares; McCormick, fifty-six and one-quarter shares; Johnson, thirty-seven and one-half shares; and Sparr, fifty shares; that this stock was paid for by the plaintiff company at the special instance and request of the above-named parties; that defendant Sparr's proportion of the purchase price was \$5,049.31, which he agreed to repay to the plaintiff, but failed and refused to do so. The answer admits that the plaintiff company paid for the stock mentioned the sum of \$20,197.23, but denies every other material allegation of the complaint. The trial of the case re-

sulted in a verdict and judgment in favor of the defendant, from which judgment the plaintiff appeals.

The record consists of the judgment-roll, without any bill of exceptions, and, of course, does not present any of the evidence. The errors assigned are the refusal of the court to give plaintiff's requested instruction No. 7, and the giving of instructions Nos. 6, 7, 8, 9, 10, and 11.

1. Plaintiff's requested instruction No. 7, which was refused, is as follows: "You are further instructed that if you believe from the evidence that the said two hundred shares of stock were purchased *for* the said A. C. Johnson, T. C. Power, Paul McCormick, and the defendant, C. W. Sparr, and held in trust by the said McCormick for the said parties, that the defendant is bound to pay his proportion of the said sum of \$20,197.23, which he admits that the plaintiff paid for said stock."

If we assume that the particular fifty shares of stock were purchased for Sparr and that McCormick holds them in trust for him, still the showing of these facts alone would be wholly insufficient to charge Sparr with their purchase price. They may have been purchased for him without his knowledge or consent. He may never have requested that they be purchased for him, and he may never have agreed to pay for them. Any controversy over this subject, however, is set at rest by the recent decision of this court in *Smith v. Perham*, 33 Mont. 309, 83 Pac. 492. In that case the court instructed the jury that, if the plaintiff delivered the goods to defendant and defendant received them, he must pay for them. The giving of this instruction caused a reversal of the judgment. Among other things, this court said: "It is elementary that before a plaintiff can prevail he must put the defendant in the wrong. * * * In order to charge the defendant, the complaint must set forth an express contract, or a request, expressed or implied, on the part of the defendant for the goods, or the delivery of the goods by the plaintiff and a promise, expressed or implied, on the part of the defendant to pay therefor. * * * The mere delivery of goods by one person to another is not of itself sufficient

to create a liability for their value. The delivery to and an acceptance by the intended purchaser must have occurred under such circumstances that the law will imply a promise to pay for them. One may not make himself the creditor of another by officiously delivering to such other person goods of whatever character." In 2 Greenleaf on Evidence, sixteenth edition, section 107, it is said: "In actions upon the common counts for goods sold, work and materials furnished, money lent, and money paid, a request by the defendant is material to be proved; for ordinarily no man can make himself the creditor of another by any act of his own, unsolicited and purely officious."

In *Boyer v. Richardson*, 52 Neb. 156, 71 N. W. 981, the same rule is announced as follows: "It is elementary law that in order to recover money paid to the use of another, where the party paying was under no obligation so to do, the payment must have been moved by a previous request from the party to whose use the money was paid. In some cases a previous request will be implied, as where the money was obtained by duress either of a person or property, or by deceit, or where there has been a subsequent express promise to repay the money, as was the case in *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748. But where the payment is entirely voluntary—where there is no subsequent promise to repay—a previous request must be proved."

In considering this same question, though presented by the pleadings, the supreme court of California, in *Curtis v. Parks*, 55 Cal. 106, said: "The complaint failing to show any agreement or understanding by which the plaintiffs were authorized to pay the defendant's part, or any promise by the latter to repay, it fails to show any right in plaintiffs to recover what must be regarded, as the case is presented by the complaint, as a voluntary payment. No man can be a debtor for money paid, unless it was paid at his request." The court properly refused this requested instruction.

2. While errors are predicated upon the giving of instructions 6, 7, 8, 10, and 11, these instructions are all considered together,

and Nos. 6 and 7 fully present all questions argued. They are as follows:

“(6) The question for your determination in this case is as to whether the plaintiff company, at the time of the transfer of the two hundred shares of its capital stock from W. H. Donovan to Paul McCormick, trustee, paid what it did pay for the same because it had purchased said stock to be held as its own or like treasury stock, and to be disposed of as its board of directors should order, or whether the stock was purchased by the defendant, Sparr, and the other stockholders in the proportion of their then holdings, each being entitled to dispose of his own share as he saw fit, the plaintiff corporation paying for the same at the request of the purchasers and for their accommodation.

“(7) The burden of proof is on the plaintiff to show that it did not buy or own the Donovan stock, and that when it paid for the same it was not paying its own obligation or indebtedness, but advanced the money as an accommodation to the defendant Power, McCormick, and Johnson, who were purchasers of the same; and the plaintiff must satisfy you by a preponderance of the evidence that it did not buy said stock, but simply advanced to the persons last named, at their request, the money to buy the same; and if you believe the weight of the evidence is against the contention of the plaintiff in that regard, or if you believe the evidence in respect to the matter to be evenly balanced, or if you are unable to say from the evidence what the truth of the matter is, your verdict should be for the defendant.”

In *State v. Mason*, 24 Mont. 340, 61 Pac. 861, this court, speaking through Mr. Justice Word, quoted with approval, and specifically adopted, the rule announced in *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505, as follows: “It is true, there is no statement in this case. But, when the instructions are erroneous under any and every state of facts, then this court will review them. For it follows as necessarily in such a case that the court erred to the prejudice of the defendant, when

there is no statement, as when one exists. If, however, the instructions *may be* correct under any supposed state of facts, as the appellant must show affirmative error, we presume in favor of the judgment below, and will not reverse the judgment when no statement appears."

In 1 Blashfield on Instructions to Juries, section 375, it is said: "So, where the instructions would be correct under a possible state of facts, and the evidence is not all before the court, it will be presumed that the evidence was such as to justify the giving of the instructions. This presumption is rebutted, however, where the record purports to contain all the evidence, or where it is apparent that the instructions would be improper under any possible state of the evidence under the pleadings." In order, then, to reverse this judgment, we are required to say that these instructions given would have been erroneous under any possible state of facts appearing at the trial of the case.

The argument of counsel for appellant is that these instructions introduced into the case an issue not raised by the pleadings, imposed upon the plaintiff the burden of proving such issue, and required the plaintiff to prove a negative. To what extent, if any, instructions may properly be given with respect to matters not strictly within the issues made by the pleadings, need not be considered. We do not think any new issue was introduced by these instructions. Every reasonable presumption will be indulged in favor of the action of the trial court, and, in the absence of the evidence, it will be presumed that the instructions were warranted by the interpretation of the pleadings acted upon by the parties, and by the evidence in the case, unless the contrary appears.

The complaint alleges that these fifty shares of stock were purchased for Sparr at his special instance and request, and that he agreed to pay for them. The question whether the shares were purchased for the plaintiff did not present a new issue, for, under his general denial, Sparr might have presented

evidence to show that the plaintiff had purchased the shares of stock for its own use and benefit and not for him.

In *Wiedeman v. Hedges*, 63 Neb. 103, 88 N. W. 170, it is said: "If suit is brought against A for goods alleged to have been sold him, it would seem that the facts necessary to be established under the petition, before a recovery could be had, could hardly be more directly controverted than by evidence establishing the fact that the contract was made with, and the goods sold to B, and all such testimony is admissible under a general denial." So, likewise, in actions in replevin and conversion, it has been held by this court that, where the plaintiff alleges ownership in himself, the defendant under a general denial may show that he is the owner of the property, or that it belongs to a third person. (*Staubach v. Rexford*, 2 Mont. 565; *Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. 961; *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884.) If, then, when A alleges ownership in himself, and, under a general denial, B may show that he is the owner of the property, the converse of this would certainly be equally true, namely, if A alleges that B is the owner, as in the case under consideration, then, under the general denial, B may show that in fact A is such owner. (*Pomeroy's Code Remedies*, sec. 558.)

These instructions would seem to indicate that the trial court understood that the theory of the defendant was that the shares of stock had been purchased by the plaintiff for its own use and benefit, and not for Sparr's account. And, if that was the position assumed by the defendant, the trial court might properly have said to the jury: "The plaintiff contends that the shares of stock were purchased for the defendant at his instance and request; the defendant contends that they were purchased for the use and benefit of the plaintiff, and not for him. It is for you to determine from the evidence which, if either, of these contentions is correct"—and this is just what the court did do, in effect, by instruction No. 6. If the theory of the defendant was that the shares of stock were purchased by the plaintiff for its own use, then instructions Nos. 8, 10,

and 11 were proper, for the court has no right to ignore the theory of either party in its instructions. (11 Ency. of Pl. & Pr. 190, note, and cases cited.)

It is also argued that instruction No. 7 imposes upon the plaintiff the burden of proving a negative; that is, that the plaintiff did not purchase the shares of stock for its own use and benefit. While this manner of presenting a question in controversy to the jury is not to be commended, we cannot say, in the absence of the evidence, that the instruction is erroneous. Confessedly, the burden was upon the plaintiff to show that the shares of stock were purchased for Sparr, and that Sparr either requested that they be purchased for him, or, knowing that they had been purchased for his use, agreed to pay for them. (*Smith v. Perham*, above.) If instruction No. 7 does not impose upon the plaintiff any additional burden, it cannot complain. The contention of plaintiff was that the shares had been purchased for Sparr at his special instance and request, and that, when plaintiff paid for the shares, it was merely advancing the money for Sparr's accommodation, and that Sparr agreed to repay the amount advanced on his account. The instruction told the jury that, if they believed the weight of the evidence was against the contention of the plaintiff, or if the evidence in respect of the matter was evenly balanced, or if they were unable to say from the evidence what the truth of the matter was, their verdict should be for the defendant—and that portion of it is certainly correct.

Furthermore, it must be presumed that the evidence showed one of two things, that the shares were purchased for Sparr or for the plaintiff, and plaintiff could prove its contention by showing that they were purchased for Sparr, or by showing that they were not purchased for itself; for, if there were but two alternatives presented, then proof of either disproved the other, and, if proving that the stock was purchased for the defendant was sufficient to show that it was not purchased for the plaintiff, then there is nothing in this record to indicate

that the burden imposed upon the plaintiff by the first portion of instruction No. 7 was any greater than that which would have been imposed had the instruction told the jury that the burden was upon the plaintiff to show by a preponderance of the evidence that the stock was actually purchased for Sparr. This instruction may be clearly erroneous under section 3145 of the Code of Civil Procedure, but, in the absence of the evidence, we must presume that it was warranted by the facts appearing at the trial.

It is said that instructions 9 and 14, given, are conflicting, and they appear to be so. No. 9 told the jury that the plaintiff must prove that the shares were purchased for Sparr at his request. No. 14 announces the rule that, where one person pays money for the use of another, the law raises an implied promise, on the part of the person for whom the money was paid, to repay the same. Instruction No. 9 correctly states the law as determined in *Smith v. Perham*, above, while No. 14 is erroneous, but in plaintiff's favor, as it only imposed upon the plaintiff the burden of showing that it had paid for the stock for Sparr's use and benefit, and relieved it of the burden of showing any request on Sparr's part in the first instance, or promise to pay in the second. But the fact that these instructions are conflicting does not require a reversal of the judgment. In *State v. Jones*, 32 Mont. 442, 80 Pac. 1095, this court said: "It is not every case of conflicting instructions which warrants a reversal. If one instruction states the law, and another one in conflict with it is given, which is erroneous, but in the defendant's favor, he cannot complain of the erroneous instruction, or of the conflict between the two"—and numerous authorities are cited in support of the rule. And there is reason for the rule. If the jury in this case followed the directions of instruction No. 9, the plaintiff cannot complain, because that instruction correctly states the law. If, on the other hand, the jury followed instruction No. 14, the plaintiff cannot complain, for,

if the jury could have been misled by that instruction, it could only have been misled in the plaintiff's favor.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing decision.

STATE, RESPONDENT, v. TRUEMAN, APPELLANT.

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(No. 2,252.)

(Submitted April 5, 1906. Decided May 14, 1906.)

Criminal Law—Homicide—Threats—Evidence—Cross-examination—Intoxication—Attorneys—Misconduct—Former Jeopardy.

Criminal Law—Homicide—Threats—Hearsay Testimony.

1. Testimony of a witness for the state, in a prosecution for murder, that he knew defendant had made threats against deceased, because his neighbors had told him so, was hearsay and inadmissible.

Same.

2. A threat, testified to by a witness for the state in a prosecution for homicide, as having been made by deceased in the following words: "I will get you sons-of-bitches yet," was inadmissible where the record failed to disclose that deceased was intended to be included in the class so characterized.

Same—Intoxication—Cross-examination.

3. Where a witness for the state, in a prosecution for murder, testified that he and deceased had been together on the day of the homicide and told generally of their movements, a question whether they had anything to drink that day was proper cross-examination for the purpose of showing such a condition of sobriety on the witness' part as to make it likely that he remembered what occurred and as shedding light upon the action of deceased, the contention of defendant having been that he acted in self-defense.

Same—Cross-examination—Self-defense.

4. It was error for the trial court, in a prosecution for murder, to exclude a question asked a witness for the state on cross-examination, whether he had not seen deceased carrying an ax-handle around with him on the day of the homicide, where the witness on direct examination had stated that deceased had walked up behind witness and defendant

and struck the latter over the shoulder with the handle—the evidence sought to be elicited not only having been proper cross-examination, but tending directly to sustain defendant's contention that deceased sought the encounter and had prepared himself for it.

Same—Self-defense—Cross-examination—Curing Error.

5. The mere fact that, in a prosecution for murder, evidence, on cross-examination, tending to show that deceased had sought the encounter and that defendant acted in self-defense, was cumulative in character, did not cure error in excluding it, since, if permitted to answer, the jury might have believed the witness under examination and not those preceding him.

Same—Intoxication—Cross-examination.

6. Where, in a prosecution for homicide, a witness had testified that he saw deceased on the day of the homicide and that he appeared to have been drinking, he should, on cross-examination, have been permitted to answer a question whether he noticed that the drinking affected the decedent's conduct, opinions of nonprofessional men as to intoxication, fear, anger, etc., being admissible in every judicial inquiry.

District Courts—Trial—Decorum.

7. The district court should see that the trial of a cause is conducted in an orderly and decorous manner, and neither counsel nor witnesses should be permitted to violate the proprieties of the courtroom with impunity.

Criminal Law—Homicide—Attorneys—Misconduct—Abuse of Witnesses.

8. In a prosecution for homicide an attorney employed by the widow of deceased to assist the state's attorney, who in course of the examination of a hostile witness, whom the court had compelled the state to call, and whose conduct toward counsel was exasperating and impertinent—remarked that the prosecution did not vouch for the witness, that he could not tell the truth, asked the witness whether he was *non compos mentis* or knew anything at all, and stated that witness unqualifiedly lied and was a "self-deluded fool that knew nothing," was guilty of such misconduct as will work a reversal of the judgment of conviction if properly presented for review.

Same—Objectionable Evidence—Misconduct of Attorneys.

9. Counsel for the state, in a prosecution for homicide, sought to get before the jury the fact that the deceased had left surviving him a widow and a small child. He proved this fact, over objection, but upon motion of defendant's counsel this testimony was later stricken out. Immediately upon this ruling, counsel for the prosecution called the widow and, by questions asked for that purpose, again brought the matter ordered stricken to the attention of the jury, and thereupon consented to the striking of this testimony. *Held*, that the behavior of counsel in asking questions which he knew, or had reason to believe, in view of the previous ruling, the court would not permit to be answered, constituted misconduct which, if properly presented, will work a reversal of the judgment of conviction.

Same—Former Jeopardy.

10. *Held*, under *State v. Keerl*, 33 Mont. 501, 85 Pac. 862, that, where the jury on a former trial of defendant charged with homicide had failed to agree, was discharged and the cause continued to the next succeeding term of court, the district court on the second trial properly refused to require the jury to return a verdict upon defendant's plea of former jeopardy.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

EDWARD B. TRUEMAN was convicted of the crime of manslaughter, and appeals from the judgment of conviction and from an order denying his motion for a new trial. Reversed and remanded.

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Respondent.

Messrs. Noffsinger & Folsom, McIntire & Kendall, Mr. W. G. Downing, and Mr. Jesse B. Roote, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Edward B. Trueman was convicted of the crime of manslaughter and appeals from the judgment, and from an order denying him a new trial. The defendant killed James McCabe on election day, November 4, 1904, near a polling place at Sedan, Flathead county. He was tried at the February term of court, 1905, but the jury failed to agree upon a verdict, was discharged and the cause continued until the May term of the same year, when it was tried a second time. Upon the second trial the defendant entered a plea of once in jeopardy in addition to his plea of not guilty, which had been interposed before the first trial. There had been a long-standing difficulty between deceased and defendant, other personal encounters between them had occurred, and each had made threats against the other.

1. A witness, Yeiser, testified to a threat made by the defendant in 1900. He testified that he was near the defendant's place; that defendant came up, with a rifle leveled at the witness, to within about twenty feet from where the witness was standing, and said: "I will get you sons-of-bitches yet." When asked how he knew that McCabe was meant, he answered: "Because my neighbors had told me previously." This was ob-

jected to upon the ground that it was hearsay, and a motion to strike it out was made. The objection was in effect overruled and the motion to strike out was denied. The testimony, so far as it related to McCabe, was clearly hearsay and inadmissible. The witness did not pretend that McCabe's name was mentioned at all by the defendant, and there is nothing in the record whatever to show that McCabe was intended to be included in the class referred to by the defendant. The mere fact that the witness said: "I know he meant James McCabe and myself and Frank Addeman," does not alter the situation, for he had testified that the reason he knew that McCabe was intended to be included was because his neighbors had told him so.

The rule of law with reference to the reception of testimony of previous threats by the defendant is stated in 21 Encyclopedia of Law, second edition, 220, as follows: "The rule as generally laid down is that threats to be admissible must indicate a purpose to do some particular person an injury, or must be expressions of ill-will or hate against a class of which the deceased is one, and must be capable of such construction as to show reference to the deceased."

2. Fred. Strodtbeck, a witness for the state, testified that he and McCabe went to Sedan together on the day of the homicide, and told generally of their movements. On cross-examination he stated that he and McCabe went to Sedan and voted before they had anything to drink (meaning intoxicating liquors). On cross-examination he was asked to state whether or not they had anything to drink that day, but, on objection by counsel for the state, he was not permitted to answer. This ruling was erroneous. It was proper cross-examination, for the purpose of showing whether the witness was in such a condition of sobriety as to be likely to remember what occurred, and as tending to shed light upon McCabe's action. The contention of the defendant was that McCabe was the aggressor, and was killed by Trueman in self-defense.

3. The witness Roddy, for the state, testified at great length with reference to circumstances preceding and attending the

homicide; that McCabe came up to where witness and Trueman were standing, came up behind Trueman and struck him over the shoulder with an ax-handle. On cross-examination he was asked to state whether or not he saw McCabe carrying that ax-handle around during that day. This was objected to by counsel for the state as not proper cross-examination, and the objection was sustained. This was also error. It was not only proper cross-examination, but tended directly to sustain the defendant's contention that McCabe sought the encounter and had prepared himself for it. There is no dispute in the evidence that McCabe not only had the ax-handle, but had a loaded revolver in his coat pocket, at the time he was killed. The testimony also tends to show that he had purchased this ax-handle during the forenoon, some considerable time before the homicide. The mere fact that the evidence sought to be elicited by the question was in a sense cumulative does not cure the error. The jury might not have believed the other witnesses and might have believed the witness Roddy.

4. A witness, Alexander, testified for the defendant that he was a clerk of election at Sedan on the day of the homicide; that he saw McCabe, and that McCabe appeared to have been drinking. He was then asked to state whether he noticed that the drinking affected McCabe's conduct. This was objected to on the ground that it called for the conclusion of the witness. The objection was sustained, and error is predicated upon this ruling. The ruling was erroneous. In *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 442, it is said: "But without reference to any recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, *intoxication*, *veracity*, general character, and particular phases of character, and

other conditions and things, both moral and physical, too numerous to mention." The correctness of this rule is settled beyond controversy. (*People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; 3 Wigmore on Evidence, sec. 1977; 17 Cyc. 91.)

5. Thomas D. Long, an attorney, was employed by Mrs. McCabe, relict of James McCabe, the deceased, to assist in the prosecution, and from the record it appears that he assumed the role of leading counsel for the state and did most of the work of interrogating witnesses at the trial. During the course of the trial Mr. Long's conduct became the subject of many protests from counsel for the defendant, and it is urged that the district court abused its discretion in permitting him to continue in the case, and that his conduct was such as to prevent the defendant from having a fair trial. There may be some question as to whether these matters are properly presented in the record. This we do not determine. The matters are discussed as though properly before us, except that the attorney general contends that the objection to privately employed counsel appearing for the state should have been made before or at the time the trial commenced.

The court compelled the state to call as one of its witnesses, Frank Roddy, as the only living eye-witness to the homicide except the defendant. Roddy appeared to be hostile to the state and friendly to the defendant. His testimony was very strongly in the defendant's favor. Almost as soon as he was called to the witness-stand, there apparently developed a very bitter feeling of hostility between the witness and Mr. Long, who was interrogating him on behalf of the state. The witness was exasperating in his conduct toward the attorney, was extremely impertinent in his replies, and merited severe punishment by the court; but, instead of controlling the conduct of the case and requiring that the trial should be conducted in an orderly and decorous manner, the court seemingly permitted counsel and witness to violate almost every propriety of the courtroom with very mild rebukes, when any were administered. The court

should have controlled the witness or should have punished him for contempt. But while the conduct of the witness was exasperating in the extreme, it did not furnish any provocation for the conduct of Mr. Long.

As illustrative of that conduct, it appears that soon after the witness was called to the witness-stand he was asked a question to which counsel for the defendant made an objection. Mr. Long said: "You compelled us to put this witness on." Mr. Downing for the defendant, said: "The court compelled you." Mr. Long replied: "We don't vouch for this witness. He is yours. We don't think he can tell the truth." Later, the witness was asked a question to which he answered that he could not tell, and Mr. Long then propounded to him this question: "Q. Are you *non compos mentis*? Do you know anything at all?" It became a question as to which of two buildings the witness Roddy was near when the homicide was committed. He was asked a number of questions respecting this matter, and why he gave a different answer at the first trial from that given at the second. In explaining his answer he said to Mr. Long: "You told me you was positive it [referring to a particular building] was the building"; to which Mr. Long replied: "I wish to say that the witness unqualifiedly lies." In answer to one of Mr. Long's questions the witness said that at the former trial counsel had abused him, and called him a "self-deluded fool that knew nothing," to which Mr. Long replied: "And I think that." Again the witness was interrogated with reference to the two buildings mentioned before, and he repeated to Mr. Long that Mr. Long had told him that he was positive one building was the particular one near which Roddy was standing, to which Mr. Long replied: "I told you once this morning what I thought of you, and tell you now that you unqualifiedly lie."

On behalf of the state Mr. Long sought to get before the jury the fact that the deceased had left surviving him a wife and a small child. He proved this fact, over the objection of the defendant, by a witness, Eugene McCabe; but afterward, on

motion of counsel for the defendant, the court struck out all testimony relating to the family of the deceased. Thereupon Mr. Long immediately called Mrs. James McCabe as a witness, asked her a few questions relating to wholly immaterial matters, and, by questions evidently asked for that purpose, again got before the jury the fact that the deceased had left surviving him a wife and baby. Upon objection by counsel for the defendant and on motion, this testimony was stricken out, Mr. Long consenting that the answer to the last question he had asked should be stricken out.

Misconduct of a prosecuting officer of the character shown above has quite uniformly been held sufficient to require a reversal of a judgment of conviction in the comparatively few instances where such misconduct has been manifested. It is the duty of the prosecuting officer to see that the defendant has a fair trial, and that he is convicted, if at all, only upon competent evidence, and to this end it is peculiarly incumbent upon the prosecuting officer to be fair and impartial. (12 Cyc. 571.) It is highly improper for him to ask questions which he knows, or has reason to believe, the court will not permit to be answered; and when the court has indicated its decision by a ruling, counsel should respect it. In *State v. Rogers*, 31 Mont. 1, 77 Pac. 293, this court reversed a judgment of conviction, because the county attorney asked a witness for the defendant certain improper questions which tended to degrade and discredit the witness.

If the prosecuting officer did not wish the witness' statements to go unchallenged, he might have become a witness, and in a proper manner have denied them; but his abuse of the witness while acting as prosecuting officer was so extreme that it cannot be justified, and, when properly presented, such misconduct will always work a reversal of a judgment of conviction. (12 Cyc. 576, and cases cited.) "It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only

as to matters legal and pertinent to the issue.” (Code Civ. Proc., sec. 3402.)

While these acts of misconduct did not pass wholly unnoticed by the court, they were not treated as they should have been, and the very leniency of the court might have been misunderstood by the jury to defendant’s prejudice.

Error is predicated upon the refusal or failure of the court to require the jury to return a verdict upon the defendant’s plea of former jeopardy. But we do not think this was error of which the defendant can complain. Had the court submitted the question to the jury for a verdict, it would have been compelled to instruct the jury to return such verdict in favor of the state upon that issue under the decision of this court in *State v. Keerl*, 33 Mont. 501, 85 Pac. 862, decided February 19th of this year, and opinion on motion for rehearing, filed April 30, 1906.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

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CASES DETERMINED
IN THE
SUPREME COURT
AT THE
JUNE TERM, 1906.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, } Associate Justices.
THE HON. WILLIAM L. HOLLOWAY, }

STATE EX REL. POOL ET AL., RELATORS, v. DISTRICT COURT
OF THE NINTH JUDICIAL DISTRICT ET AL., RESPOND-
ENTS.

(No. 2,298.)

(Submitted April 12, 1906. Decided June 4, 1906.)

*Certiorari—Contempt—Water Rights—Injunction—Jurisdiction
—Judicial Districts.*

Certiorari—Contempt—Water Rights—Injunction—Judicial Districts—Jurisdiction.

1. Certain water rights were adjudicated between the various claimants and an injunction issued restraining all parties to the action from interfering with each other's rights, in Meagher county, attached to the sixth judicial district. Subsequently that part of this county wherein the waters in controversy in that cause were situate was added to Broadwater county, a portion of the ninth judicial district. For a violation of the injunctive portion of the decree above mentioned the relators were punished for contempt by the district court of the ninth district. *Held*, on *certiorari*, that the court had jurisdiction of the contempt proceedings and could do all things to enforce the decree that its predecessor, the district court of the sixth district, might have done had the change in districts not been made.

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Contempt—Water Rights—Injunction—Parties.

2. *Quære*: May a person, who was not a party to a water right suit in which an injunction was issued, but who occupies the relation of a privy to one of the parties whose rights were adjudicated, be held to obey the mandate of the court which runs only to the parties directly interested and not to their successors and assigns, and where he may be unaware of the existence of such injunction?

Injunction—Water Rights—Contempt—Parties.

3. Where a decree, entered in a suit to determine water rights, in terms only enjoins the parties directly interested from interfering with the rights of each other as adjusted between them, a successor in interest to the rights of one of the parties, who at one time asserted the benefits of the injunctive feature of the decree as against the other parties to it, and again willfully and knowingly disregarded the provisions of it, made himself, by such conduct, to all intents and purposes a party to it and may be held liable in contempt for a violation of it.

ORIGINAL application by the state, on the relation of G. E. Pool and another, for writ of review to the ninth judicial district court of the state, in and for the county of Broadwater, and the Honorable W. R. C. Stewart, judge thereof, to annul its judgment convicting relators of contempt. Application denied.

Mr. C. B. Nolan, for Relators.

Messrs. Wallace & Donnelly, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On August 26, 1890, in a suit pending in the district court of the sixth judicial district of the state of Montana, in and for the county of Meagher, entitled "*John Dunlavey et al. v. James Grubb et al.*," after a trial there was made and entered a decree adjudicating and settling the rights of the parties, plaintiff and defendant, to the use of the water flowing in Confederate creek, in said county. It was therein adjudicated that John Dunlavey, the plaintiff, was entitled to the use of one hundred inches, statutory measurement, appropriated in March, 1866, and one hundred inches appropriated on May 1, 1866. It was also adjudicated that Walter R. Morgan was entitled to the use

of sixty-five inches of said water, appropriated on May 2, 1866, and one hundred and twenty-five inches appropriated in 1872, and that A. Estes, or his successor, was entitled to sixty-five inches as of the date of May 2, 1866. At the time the action was brought, Meagher county was attached to the fourth judicial district. When the territory was admitted into the Union as a state, Meagher county was attached to the sixth judicial district. By an Act of the legislature, approved February 9, 1897 (Sess. Laws, 1897, p. 45), the county of Broadwater was created, and under the provisions of that Act all that part of Meagher county wherein the water in controversy in the cause mentioned is situate was included in the county of Broadwater. That county was by the terms of the Act attached to the ninth judicial district. The decree fixes the dates of appropriation and the amounts of the various water rights, and directs that the parties plaintiff and defendant shall use them according to the relative priorities fixed therein. It contains the following provision: "And it is further ordered, adjudged and decreed that the parties appearing herein be, and they are, and each of them is, hereby forever restrained and enjoined from interfering with the prior right of any party hereto as fixed by this decree."

On November 13, 1905, the plaintiff, John Dunlavey, filed in the district court of the ninth judicial district an affidavit setting forth, in substance, the following: That he is familiar with Confederate creek in Broadwater county, Montana, and the various irrigation ditches leading therefrom, as well as with that certain decree finally determining the rights in and to the water of said creek, rendered August 26, 1890, in that certain cause in the district court of the sixth judicial district of Montana, in and for Meagher county, wherein John Dunlavey and others were plaintiffs and James Grubb and others were defendants; that by the terms of said decree the parties appearing therein, including Walter R. Morgan and A. Estes, were forever restrained and enjoined from interfering with the prior rights of any other party as fixed by said decree; that at all the times during the year 1905 Dora Pool was and since has been the suc-

cessor in interest as grantee of Walter R. Morgan in the water rights and water of Confederate creek awarded by said decree, in a total of one hundred and ninety inches; that J. D. Doggett was, and since that time has been, the successor in interest of A. Estes in the water of said creek, to the extent of sixty-five inches awarded by the decree, and that at all of said time G. E. Pool was the husband of Dora Pool and was using water from the creek as hereinafter stated, either as lessee and agent or successor in interest of Dora Pool, and that at all the times mentioned Dora Pool, G. E. Pool, and J. D. Doggett knew of said decree and the terms thereof, having sought and enjoyed the use of the water awarded thereby, and having sought and enjoyed benefits thereunder; that each of the rights of Estes and Morgan, to which the Pools and Doggett had succeeded, are subsequent to the rights of Dunlavey, as set forth in the decree mentioned; that under his said right Dunlavey is entitled to two hundred inches of the water of the creek, when necessary for the irrigation of his crops, to the exclusion of the rights of the Pools and Doggett; that at all the times during August and September, 1905, and ever since, the water so decreed to affiant was and is necessary for his use for the purpose of irrigating his growing crops, for which said water was decreed as aforesaid; that at divers dates in August and September, 1905, and since, particularly on August 31 and September 4, 1905, Dora Pool, G. E. Pool, and J. D. Doggett did divert, use and turn away from affiant's use a large quantity of the water of said creek to which affiant was ~~then~~ and there entitled under the decree; that they turned the same out of the natural channel at points above the heads of affiant's irrigating ditches and failed and refused to turn down said water to affiant; that they wrongfully and unlawfully withheld such water to the extent of one hundred inches, measured according to said decree, from the affiant; and that, after being notified of the need of the water, they refused to turn it or any part thereof back into the channel of the creek, when requested so to do by affiant and his agent,

all to the great damage and injury of affiant's crops, which were thereby deprived of the water aforesaid.

Upon the filing of this affidavit the Honorable W. R. C. Stewart, judge of the district court of the ninth judicial district in and for the county of Broadwater, issued a citation to G. E. Pool and J. D. Doggett, citing them to appear and show cause why they should not be adjudged in contempt and punished for the violation of the injunction contained in said decree. Pool and Doggett appeared in obedience to the order of citation, and thereupon, after hearing of the evidence, the court found both guilty of contempt, and on March 9, 1906, entered its judgment adjudging that each should pay a fine of one hundred and fifty dollars, or, in default thereof, should be committed to jail until the fine be satisfied. Application was thereupon made to this court for a writ of review to annul the judgment of conviction. An order was issued directing the district court and its judge to show cause why the writ should not be allowed. On the day fixed for the hearing, the said court and judge objected to the allowance of the writ, on the ground that the affidavit does not state facts sufficient to make a case authorizing this court to issue the writ.

An incidental question presented by counsel for relators is whether, since the action was determined and the injunction issued by the district court of the sixth district, sitting in Meagher county, the district court of the ninth district, sitting in Broadwater county, has jurisdiction to enforce the decree, the latter county at the time of the rendition of the decree being included in part in the former while attached to the sixth district. This question seems hardly to deserve serious consideration.

The Act creating Broadwater county attached it to the ninth district for judicial purposes. If this provision means anything, it means that the court of the ninth district is clothed with jurisdiction for all purposes, so that it can do all that its predecessor might have done had no change been made. In order to meet the requirements of this changed condition, the

twelfth section of the Act (Session Laws, 1897, p. 48) made it the duty of the board of commissioners of the new county to obtain certified transcripts of all records of the counties (Meagher and Jefferson), portions of which were included therein, affecting property situate within the county, and have them filed with the clerk of the county. This was done for the purpose of supplying the new county with records so far as they affect the title to property. These records are declared by this section to be admissible in evidence in all courts in the state, and entitled to like faith and credit as the original records. Thus the intention was and is manifested that the transcribed records should perform for the new county the same office as the original records of Meagher and Jefferson counties, and that the court of the ninth district should have the same power to enforce judgments evidenced by them as the court sitting in Meagher county.

The legislature has power to create new counties, and, in doing so, to divide those already created. It also has power to change the judicial districts in the state. This implies the power to provide for the preservation of liens and the efficacy of judgments theretofore rendered in the courts as the counties and districts were severally constituted at the time of their rendition. The fact that a county, or a part of it, may have been at one time included in one district and at another time in another, does not affect the validity of any judgment or the jurisdiction of the district court of the particular district. Especially so, when the purpose of the legislature is manifested by express provisions of law to prevent the very confusion and uncertainty which counsel insists must result from the division of one or more counties in the creation of a new one.

Now, contempts are criminal in their nature (*State ex rel. Flynn v. District Court*, 24 Mont. 33, 60 Pac. 493), and must be tried in the jurisdiction—that is, the county—where committed. If the contention of counsel should be sustained, the result would be that no decree rendered by the district court of the sixth district, for Meagher county, could be enforced by

the district court of the ninth district, for Broadwater county. Nor would the court sitting in the former have jurisdiction, because the real estate with reference to which adjudication was made is situate in Broadwater county. Such decrees would be worthless except as evidence to establish an estoppel under an allegation of *res adjudicata*.

The principal questions submitted for decision are two: First, whether the relators, not being parties to the action in which the rights to the use of the water of Confederate creek were adjudicated and the perpetual injunction was issued, and who are not named therein, became subject to its provisions by becoming privies in estate to some of the parties defendant expressly included; and, if not, secondly, whether the other facts appearing in the affidavit filed in the contempt proceeding present a case of willful interference with the operation of the decree after knowledge of its existence.

That the relators are privies in estate to Estes and Morgan is clear. (2 Bouvier's Institutes, sec. 3102.) That, as such, they are estopped to deny or controvert Dunlavey's superior right is equally clear, because they are identified with their predecessors in interest. (Id.; Code Civ. Proc., sec. 3196; *Campbell v. Rankin*, 2 Mont. 363; *Hunt v. Haven*, 52 N. H. 162; 1 Freeman on Judgments, 2d ed., sec. 162.) In an action brought by Dunlavey, or by them, to settle the rights they or any of the other parties claim, they would be, so far as now appears, estopped to controvert or question any of the rights already adjudicated.

Are the relators, then, bound by the injunctive feature of the decree? Generally speaking, an injunction operates only *in personam* and affects only the parties to the action. Therefore no one can be punished for contempt for a violation of it except parties having notice of it. To this general rule, however, there are several exceptions. As was said in *Re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110: "To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction

was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice." Some of the exceptions are where the injunction runs against the agents, servants and employees or grantees and the successors of a party, or where third persons act in collusion with a party in violation of the injunction. (2 High on Injunction, sec. 1440a; *Dadirrian v. Gullian* (C. C.), 79 Fed. 784; *Rigas v. Livingston*, 178 N. Y. 20, 70 N. E. 107; *In re Reese* (C. C.), 98 Fed. 984; *Buhlman v. Humphrey*, 86 Iowa, 597, 53 N. E. 318; *Boyd v. State*, 19 Neb. 128, 26 N. W. 925; *Shelby v. Burtis*, 18 Tex. 644.)

In the case of *Ahlers v. Thomas*, 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 93, the supreme court of Nevada recognizes another exception. In that case the contemnor became the grantee of one of the defendants after decree in an action brought to adjudicate the right to the use of water flowing in a certain stream. The decree was entered by default and embodied an injunctive feature restraining the defendants, their grantees, etc., from interfering with the plaintiff's rights. It was held that the decree was binding as to the contemnor, and, though it is not so stated, the ground of the holding appears to have been solely that he was a grantee, the theory of the court evidently being that since the decree was binding as to the rights involved, its mandate directed to the defendants was also binding on the defendants' grantees, whether they were mentioned therein or not. This exception is also recognized by the supreme court of Illinois in *Safford v. People*, 85 Ill. 558.

The same exception, slightly modified, seems to be recognized in the case of *Rigas v. Livingston*, *supra*, in which the court uses this language: "It is true that persons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants, or act in collusion or combination with them. * * * Authorities illustrating the rule might be cited to an indefinite extent, but the underlying principle in all cases of this class, on which is founded the power of the court to punish for the violation of its mandate persons not parties to the action, is that the parties

so punished were acting either as the agents or servants of the defendants, or in combination or collusion with them, or in assertion of their rights or claims."

The last clause of this quotation implies that, where a third party asserts the right or claim of one of the parties to the injunction, he will be held to be bound by the terms of the injunction. The rule here stated excludes a privy who, with knowledge of the injunction, asserts rights under it. It is not necessary, then, to go to the extent of either of the cases of *Ahlens v. Thomas* or *Safford v. People, supra*, in order to reach the conclusion that the relators are not entitled to the writ prayed for herein.

For present purposes it may be conceded that mere privity in estate is not sufficient to warrant the holding that the party occupying the relation of a privy who was not a party to the suit at the time of the rendition of the judgment, must be held to obey the mandate of the injunction; for it is possible for a case to arise in which the privy has no knowledge whatever of the injunction. It does not seem that under such circumstances he should, upon principle, be punished; for while the grantee, if expressly mentioned, may well be held to be subject to the mandate, yet, if not mentioned, it is questionable whether he should be so held.

In the case of *Ahlens v. Thomas* the decree ran against the defendant and their grantees. Here the words of the decree include only the defendants. If the relators should be held to come within the mandate of the decree on the ground of their privity alone, the punishment inflicted would be for violating an order of which they might have had no knowledge, even presumptively, since the decree does not in terms include them.

But it appears that the relators are not only privies by purchase from Estes and Morgan, but from time to time prior to the acts complained of as a violation of the injunction, they claimed the benefit of the decree by petitioning the court to appoint a water commissioner to administer the various rights adjudicated therein, under the Act of the legislature authorizing

such an appointment. (Session Laws, 1905, p. 144.) Under this Act the appointment of a commissioner to administer the rights could only be made upon petition of at least twenty-five per cent of the owners of water rights affected by the decree. It is conceded here that the relators joined in the procurement of such appointment, and that they enjoyed the benefits of the decree as administered by the commissioner, but afterward, concluding, no doubt, that as they were not specifically mentioned therein, they could not be held bound, they refused to respect it. They are therefore found in the attitude at one time not only of privies in estate of their grantors, but asserting the benefit of the injunctive feature of the decree as against the other parties to it who are with the plaintiffs mutually bound by it, and at another time willfully and knowingly disregarding the provisions of it. This brings the case clearly within the rule of the exception stated in *Rigas v. Livingston, supra*, and we think that the court properly punished them for their conduct; for, having availed themselves of the provisions of the decree as if they were bound by it, and having claimed benefits thereunder, they may not now be heard to say that they could afterward still claim the rights awarded by it, but refuse to obey its mandate. While not mentioned in the decree, either specifically or by general reference, they have, to all intents and purposes, made themselves parties to it by asserting rights under it, and they must be held to obey it.

The result is that the order to show cause must be set aside, and the application for the writ denied. It is so ordered.

Writ denied.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY, concur.

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**PALATINE INSURANCE COMPANY, APPELLANT, v.
NORTHERN PACIFIC RAILWAY COMPANY, RESPOND-
ENT.**

(No. 2,239.)

(Submitted March 3, 1906. Decided June 4, 1906.)

***Constitutional Law—Statutes—Passage of Bills—Limitations—
Legislative Amendments—Evidence.***

Enactment of Statutes—Constitution—Limitations.

1. Under Constitution, Article V, section 24, requiring, among other things, that no bill shall become a law unless the names of the members in each House voting be entered on the journal, the Act of March 11, 1901 (Laws 1901, p. 157), relating to "the limitation of time within which actions may be brought," did not become a law, it appearing from the journal of the Senate that the names of the members of that branch of the Seventh Legislative Assembly voting on the measure were not entered on the journal.

Enactment of Statutes—Constitution—Evidence.

2. The journal of either House of the legislature imports verity, and may be looked to to determine whether or not a bill, valid on its face, signed by the presiding officer of each House, approved by the governor and deposited in the office of the Secretary of State, was in fact passed in compliance with the requirements of section 24, Article V of the Constitution.

Statutes—Amendment by Title—Constitution.

3. Held, that section 524 of the Code of Civil Procedure, being Act of 1893, approved March 9, relating to the limitation of time within which certain actions must be brought, made a part of the Codes of 1895 by section 5186, was not an amendment of the Act of 1893, but recognized as the law of the land by the legislature and simply continued in force as such, and that therefore section 25, Article V of the Constitution providing that no bill shall be amended by title only has no application.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by the Palatine Insurance Company, Limited, of Manchester, England, against the Northern Pacific Railway Company. From a judgment in favor of the defendant, plaintiff appeals. Affirmed.

Mr. W. T. Pigott, and Mr. R. R. Purcell, for Respondent.

The Act of March 11, 1901 (Laws 1901, p. 157), was an enrolled bill, was signed by the proper presiding officers, was

approved by the governor, and was deposited and filed with the Secretary of State. These facts appear upon the face of the bill. From these facts arises the conclusive presumption of regular enactment. The omission from the Senate journal of a statement that the bill was passed and of the names of the members voting cannot be used to rebut such presumption. (*State v. Long*, 21 Mont. 26, 52 Pac. 645, approved in *Durfee v. Harper*, 22 Mont. 354-362, 56 Pac. 582.)

In the case first cited this court adopted the rule declared by the supreme court of Washington in *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340, and by the supreme court of Missouri. Little can be added to the forceful logic of the opinions in the Washington and Missouri cases, re-enforced, as each is, by the array of authorities and the reason of the thing. We suggest, however, as a further reason why the rule should be followed, that if courts may go behind an enrolled bill to ascertain whether the provisions of section 24 of Article V were complied with, then manifestly courts must go behind such a bill to ascertain whether it was referred to a committee, or whether returned from a committee, or was printed for the use of the members, each of which is required by section 22 of Article V of the Constitution. (*Feld v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Yolo County v. Colgan*, 132 Cal. 265, 84 Am. St. Rep. 41, 64 Pac. 403; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9-12, and the cases cited in *State ex rel. Reed v. Jones*, *supra*.)

The repealing clause of an Act repeals all prior laws and parts of laws inconsistent with its provisions, although those prior laws are not mentioned by title or number. (*Application of Ryan*, 20 Mont. 64, 50 Pac. 129; *Cooley's Constitutional Limitations*, 183; *Compagnie v. State Board of Health*, 51 La. Ann. 645, 72 Am. St. Rep. 458, 25 South. 591, 56 L. R. A. 796, 801, notes; *State v. Massey*, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 309, and notes; *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *People v. McCallum*, 1 Neb. 182; *Mayor etc. v. Trigg*, 46 Mo. 288; 23 Am. & Eng. Ency. of Law, 283, and notes; *District of*

Columbia v. Hutton, 143 U. S. 18, 12 Sup. Ct. 369, 36 L. Ed. 60.) Nor does it matter whether the new statute by its title or in the body of the Act is assumed to be amendatory or not; it is enough if it clearly has that effect. (23 Am. & Eng. Ency. of Law, 282; *Smaile v. White*, 4 Neb. 353; *Sovereign v. State*, 7 Neb. 409; *Stricklett v. State*, 31 Neb. 674, 48 N. W. 820; *In re House Roll*, 31 Neb. 505, 48 N. W. 275.) Statutes of limitation must be taken to act prospectively and not retrospectively. As to causes in existence when the new statute takes effect, the statute commences to run when the cause of action is first subjected to its operation, unless the statute itself, by express language or necessary implication, declares the legislative will to be otherwise. (*Gillette v. Hibbard*, 3 Mont. 412; 1 Wood on Limitations, secs. 9-13.)

Messrs. Wallace & Donnelly, for Appellant.

While the rule in *Gillette v. Hibbard*, 3 Mont. 412, is undoubtedly the rule in a number of states, it is by no means true that it is the universal rule, even in the absence of such a statute as section 3456. On the contrary, many decisions can be found that statutes of limitations affect all causes of action, whether in existence when the statutes are enacted or not, and whether such statutes are by their terms made to act retrospectively or not, the sole condition being that a reasonable time be allowed in which suit may be begun. (*Osborne v. Lindstrom*, 9 N. Dak. 1, 81 Am. St. Rep. 516, 81 N. W. 72, 46 L. R. A. 717. See, also, *Lamb v. Powder River Live Stock Co.*, 132 Fed. 434, 67 L. R. A. 562, 65 C. C. A. 570; *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; *Relyea v. Tomahawk Paper Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412; *Smith v. Packard*, 12 Wis. 371; *Parker v. Kane*, 4 Wis. 11, 65 Am. Dec. 283; *Pollard v. Tait*, 38 Ga. 439; *Holcombe v. Tracy*, 2 Minn. 241; *Bradley v. Norris*, 63 Minn. 156, 65 N. W. 357; *O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274; *Marston v. Seabury*, 3 N. J. L. 435, 4 Am. Dec. 409; *State v. Clark*, 7 Ind. 468; *Sampson v. Sampson*, 63 Me. 328; *Watson v. Forty-second St. etc.*

Ry. Co., 93 N. Y. 522; *Royce v. Hurd*, 24 Vt. 620; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56; *Pierce v. Tobey*, 5 Met. 168; *Acker v. Acker*, 81 N. Y. 143; *Clark v. Gibbons*, 83 N. Y. 108.)

The three-year period of limitation is to be reckoned from the date of the accrual of the cause of action. This being so, the only question is whether the period thus allowed between March 9, 1903, and January 21, 1904, was a reasonable period. Clearly, we think it was. This period was ten months and twelve days. In *Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566, this court held a period of a little less than thirteen months to be a reasonable period. We give below a list of cases from other states with the time which in each of them was held to be reasonable under such circumstances: *Terry v. Anderson*, 95 U. S. 625, 24 L. Ed. 365 (nine and one-half months); *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. 854, 27 L. Ed. 808 (eight and one-half months); *Wheeler v. Jackson*, 137 U. S. 245, 11 Sup. Ct. 76, 34 L. Ed. 659 (six months); *Turner v. New York*, 168 U. S. 90, 18 Sup. Ct. 38, 42 L. Ed. 392 (six months); *Stine v. Bennett*, 13 Minn. 153, Gil. 138 (four and one-half months); *Russell v. Akeley Lbr. Co.*, 45 Minn. 376, 48 N. W. 3 (six months); *Bigelow v. Bemis*, 2 Allen, 496 (five months); *Smith v. Packard*, 12 Wis. 371 (eight and one-half months); *Cameron v. Louisville etc. R. R. Co.*, 69 Miss. 78, 10 South. 554 (one year); *Horbach v. Miller*, 4 Neb. 31 (four and one-half months); *Myers v. Wheelock*, 60 Kan. 747, 57 Pac. 956 (six months); *Power v. Kitching*, 10 N. Dak. 254, 88 Am. St. Rep. 691, 76 N. W. 737 (seven months).

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an action arising out of a tort alleged to have been committed by the defendant, a foreign corporation, on January 21, 1901, at the county of Jefferson. Certain buildings, of the value of \$500, owned by one Scharf, on which he held a policy of insurance issued by the plaintiff company for that sum, were burned by the defendant. Plaintiff paid the amount of the insurance to Scharf and took an assignment of his right of

action against the defendant. Defendant refused to pay, and plaintiff sued for the \$500.

Among other things, the defendant railway company pleads the statute of limitations: First, in that the action was not commenced within the time limited by section 524 of the Code of Civil Procedure and was therefore barred; secondly, that House Bill No. 75, being entitled "An Act entitled an Act," etc., was never constitutionally enacted, and therefore never became a law of the state of Montana, for that the same was never in fact passed by a majority vote of all the members of the Senate, or by a vote of any members of the Senate, and that an aye and nay vote was never taken in the Senate, and that there was not any name of any member of the Senate, voting for or alleged to have voted on the final passage of said bill, ever entered on the journal of the Senate, and that the journal of the Senate affirmatively shows that said bill was never voted on at all before final passage; and, thirdly, that the action was not commenced within a reasonable time after March 9, 1903, the date of approval of the Act of the eighth legislative assembly, entitled "An Act to amend sections 513, 514 and 524 of the Code of Civil Procedure, and to repeal an Act approved March 11, 1901 (being House Bill No. 75), relating to limitations of actions," and that said cause of action is barred by the provisions of section 524 of the Code of Civil Procedure as amended by said Act approved March 9, 1903 (Laws 1903, p. 292), and particularly by the provisions of subdivision 3 of section 524 as amended by the last-named Act.

As stated in the brief of appellant, the questions involved are: (1) May the journals of the Assembly ever be resorted to for the purpose of showing that an enrolled bill, signed by the presiding officers, perfect on its face, approved by the governor, and duly deposited with the Secretary of State, was not legally enacted? (2) If the journals may be so examined, then was the bill never a law because of the *omission* in the journal of an entry showing that a vote was had, and the names of the members voting upon the bill? And (3) if such an enrolled bill be

such conclusive evidence of its regular enactment, the Act of March 11, 1901 (Laws 1901, p. 157), was valid, and the next question is: Was the remedy barred by the provisions of subdivision 3 of section 524 of the Code of Civil Procedure, or of subdivision 3 of the section as amended by the Act of March 9, 1903?

The first question we shall consider is: Is the Act of 1901 void? Section 24, Article V of our Constitution reads as follows: "No bill shall become a law except by a vote of a majority of all the members present in each House, nor unless, on its final passage, the vote be taken by ayes and noes, and the names of those voting be entered on the journal."

Exhibit "A," attached to the answer, is a copy of the journal minutes of the Senate pertaining to the matter of the bill of 1901. It affirmatively appears from an examination of the minutes, which it is admitted are a correct transcript, that there is not any record in the minutes of "the names of those voting." They were never entered. It does not appear from these minutes that the bill was ever passed by the Senate at all. On the contrary, it appears that it was not. The Constitution is the supreme law of this state, if not in contravention of the Constitution of the United States or of valid federal laws or treaties. It is supreme in this case and must be followed and adhered to by this court. The Constitution says: "No bill shall become a law," unless, among other things, "the names of those voting be entered on the journal." It follows logically that the bill did not become a law. There is no escape that we can see from this conclusion.

The courts of the Union are hopelessly divided upon the question as to whether or not the minutes—that is, the journal—of either House of a legislature may be looked into to determine whether or not a bill, valid on its face, signed by each presiding officer, approved by the governor and signed by him and deposited with the Secretary of State in his office, and therefore *prima facie* valid, shall be recognized as a law by the courts, although the journals may show that no such bill was in fact

ever passed by the legislature or either House thereof. The provision of the Constitution to which we refer, in our opinion would be absurd and useless if evidence may not be taken to determine whether or not the will of the people, as expressed in the Constitution, has been obeyed by their servants, the legislators. The journal imports verity. The journal of the Senate here shows that the bill was indefinitely postponed. It also affirmatively shows that the command of the Constitution, to-wit, that the names of those voting should be entered, was not obeyed. We must look to the journal, which in this case is admitted to be correct, and we declare that this bill of 1901 never became a law, for that the names of those voting were not entered on the journal of the Senate. (*Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582.) For the authorities *pro* and *con* on the question whether or not the journal may be considered, see *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, and cases cited in the briefs there set out at length by the reporter, and footnotes referring to each state in the Union. So far as anything in the opinion of *State ex rel. Bray v. Long*, 21 Mont. 26, 52 Pac. 645, conflicts with the views herein expressed, what is held in that case is now reversed.

It is not necessary now to consider the Act of 1903 referred to, for the reason that the Act of 1901, which the Act of 1903 attempted to repeal, and the amendment (by the Act of 1903) of section 524, subsection 3, not altering the provision of subsection 3 of the Act of 1893 in any wise, the limitation stood as in 1893, the amendment of 1903 (subsection 3) being merely cumulative, if of any effect at all.

This brings us to a consideration of section 42 of the Code of Civil Procedure of 1887 (Compiled Statutes, 1887, Div. I, p. 69), as amended by Session Laws, 1893, page 50, being now section 524 of the Code of Civil Procedure of 1895. This section 524 is the Act of March 9, 1893, "brought forward" (*Penwell v. County Commissioners*, 23 Mont. 357, 59 Pac. 167), or "continued in operation" (*Chowen v. Phelps et al.*, 26 Mont. 531, 69 Pac. 54), or "continued in force" (*City of Helena v. Rogan*

et al., 27 Mont. 137, 60 Pac. 709), or "retained by section 5186 of the Political Code" (*In re O'Brien*, 29 Mont. 540, 75 Pac. 196). Subsection 3 is the same in section 42 (Compiled Statutes, 1887) in the Act of 1893, and in section 524 of the Code of 1895, and the same language is used in it in fixing the limitation as two years in "an action for taking, detaining or injuring any goods or chattels. * * *" There is not any point made in this case that possibly the property destroyed by the fire was real estate. It is considered personal property in the pleadings and in the briefs.

The point is made by appellant that section 524 of the Code of Civil Procedure of 1895 is, if anything, an amendment of the Act of 1893, and is void and of no effect, for that it was not enacted in accordance with section 25 of Article V of the Constitution, which provides: "No law shall be revised or amended, or the provisions thereof extended by reference to its title only, but so much thereof as is revised, amended or extended shall be re-enacted and published at length." Our opinion is that the laws passed by the third legislative assembly—that is, of 1893—and referred to in section 5186 of the Political Code, are not amendments to the Code, but the laws of the land at the time of the passage of the Codes, recognized by the legislature to be such, and simply referred to as such as continuing in force, or brought forward from the Session Laws into the Codes, as suggested in the opinions from which the several phrases, such as "brought forward," "continued in operation," etc., are quoted above herein. This court has always treated them as such, and not as amendments. (*Campana v. Calderhead*, 17 Mont. 548, 44 Pac. 83, 36 L. R. A. 277; *Steele v. Gilpatrick*, 18 Mont. 453, 45 Pac. 1089; *Jobb v. County of Meagher*, 20 Mont. 424, 51 Pac. 1034; *Home B. & L. Assn. v. Nolan*, 21 Mont. 205, 53 Pac. 738; *Penwell v. County Commissioners*, 23 Mont. 351, 59 Pac. 167; *King v. Pony Gold Min. Co.*, 24 Mont. 470, 62 Pac. 783; *State v. Dickinson*, 26 Mont. 391, 68 Pac. 468; *Chowen v. Phelps*, 26 Mont. 524, 69 Pac. 554; *City of Helena*

v. *Rogan*, 27 Mont. 135, 69 Pac. 709; *In re O'Brien*, 29 Mont. 530, 75 Pac. 196.)

A reply was filed admitting the allegations of the answer, except as to its conclusions of law, except, also, that it denied that the action was not brought within a reasonable time after the passage of the Act of 1903. Motion for judgment on the pleadings was made by defendant, which motion was granted. Of course, the court must have held below that the Act of 1901 was invalid, and that the amendment of 1903, so far as subsection 3, under consideration, is concerned, did not change the period of limitation, and that section 524 of the Code of Civil Procedure, being the Act of 1893 amending section 42 of the Code of Civil Procedure of 1887, was in full force and effect, and that the period of limitation, to wit, two years, mentioned in said section 524, had run before the commencement of the action.

In this we think the court was correct. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied, June 16, 1906.

DOLAN ET AL., RESPONDENTS, v. PASSMORE ET AL., APPEL-
LANTS.

(No. 2,245.)

(Submitted June 5, 1906. Decided June 11, 1906.)

*Mines and Mining—Location—Declaratory Statements—Statu-
tory Requirements.*

*Mining Claims—Location—Statutory Requirements—Substantial Com-
pliance.*

1. The provisions of sections 3611 and 3612 of the Political Code, relative to locations of mining claims, are mandatory, and must be substantially followed in order that the locator may acquire any right under his location.

Same—Defective Declaratory Statement.

2. *Held*, in an action for damages for trespass alleged to have been committed by defendants in mining and removing ores from a certain mining claim, that the court committed error in admitting in evidence a copy of plaintiffs' declaratory statement of location which contained, among other things, the following: that locator "dug a tunnel at the point of discovery of the following dimensions: about twelve feet long, six by four and one-half cut three feet deep, six feet wide, wherein is disclosed a well-defined crevice and valuable deposit of ore"; in that the statement was defective for failure to disclose that a vein or lode had been cut by the tunnel at a depth of ten feet below the surface, as required by section 3612 of the Political Code.

Same—Declaratory Statement—Record—Proof.

3. The declaratory statement of a mining location required to be filed for record in the office of the county clerk and recorder by section 3612 of the Political Code cannot be supplemented by proof of what was actually done in the premises.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by John C. Dolan and another against Charles S. Passmore and another. Judgment for plaintiffs. Defendants appeal from the judgment and from an order denying them a new trial. Reversed and remanded.

Messrs. McBride & McBride, and Mr. Jas. E. Murray, for Appellants.

34	277
34	400
34	470
34	471

34	277
34	162

34	277
41	398

34	277
40	285

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover a judgment for damages for trespass alleged to have been committed by defendants by mining and removing ores from certain mining ground situated in Silver Bow county, to which plaintiffs allege title by location as the Boston Lode Mining Claim, and by the destruction of certain buildings thereon. The defendants deny all the allegations of the complaint and allege that they are in possession and entitled to the possession as the owners of the ground, under a location made by them as the Iron Cliff Lode Mining Claim. Upon a trial by jury plaintiffs had verdict, and judgment was thereupon entered in their favor. The defendants have appealed from the judgment and an order denying them a new trial. Plaintiffs' discovery was made on January 1, 1900, and the record of it made on March 31, 1900. Defendant's location was made later in the same year.

Of a number of contentions argued in appellants' brief, only one requires notice, since it must be sustained and is conclusive of the case. Their contention presents the question: Did the court err in admitting in evidence a copy of plaintiffs' declaratory statement of location?

The ground of the objection to the declaratory statement was that it does not show that within ninety days after their discovery was made, the plaintiffs sunk a discovery shaft upon the vein to a depth of at least ten feet from the lowest part of the rim of said shaft at the surface, or that they did an equivalent amount of work by means of a cut, cross-cut, or tunnel to expose the vein at the depth of ten feet below the surface, or that they ran an open cut at least ten feet in length along the vein from the point where it was discovered, as provided by section 3612 of the Political Code. Section 3611 of this Code provides that the locator or locators must sink a shaft on the lode or claim to the depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or deeper, if necessary to show a well-defined crevice or valuable deposit. As an equivalent, a cut or

cross-cut, or tunnel cutting the lode at the depth of ten feet below the surface, or an open cut for at least ten feet along the lode from the point of discovery, is deemed sufficient. Under section 3612 the declaratory statement must show the dimensions and location of the discovery shaft, or its equivalent. The evident purpose of this latter provision is that it may appear of record that the requirements of section 3611 have been complied with, and hence that the locator or locators may appear to one examining the statement to be vested with the inchoate title.

It has been repeatedly held by this court, not only that the provisions of these statutes are valid, but that they are mandatory, and must be substantially followed, in order that the locator may acquire any right under his location. (*Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153; *Hahn v. James*, 29 Mont. 1, 73 Pac. 965; *Wilson v. Freeman*, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833; *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963; *Baker v. Butte City Water Co.*, 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617.) On writ of error to the supreme court of the United States in the last case, the validity of this statute was upheld. (*Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409.)

In *Purdum v. Laddin*, it was held that the declaratory statement must contain "the location and description of each corner with the markings thereon." In *Hahn v. James*, it was said: "While all the other steps prior to the record of the notice may have been taken, yet, without the record in substantial compliance with the statute, the location is of no value." So in *Wilson v. Freeman*, it was held that, if the location under which title is claimed be a relocation of an abandoned claim, the requirements of section 3615 of the Political Code, both as to the acts done and the contents of the record, must be substantially observed.

As to the preliminary work done on this location, the statement contains the following: "For the purpose of perfecting the location of said claim as required by law, the undersigned have heretofore, and within ninety days after posting said notice

of location, dug a tunnel at the point of discovery of the following dimensions: about twelve feet long, six by four and one-half cut three feet deep, six feet wide, wherein is disclosed a well-defined crevice and valuable deposit of ore." This statement does not meet the requirements of section 3612, *supra*, in that it does not appear that a vein or lode was cut at the depth of ten feet below the surface; for if, instead of sinking a shaft to the depth of ten feet in the clear upon the vein, the equivalent work is done, it must be either by cut, cross-cut or tunnel cutting the vein at a depth of at least ten feet, or by an open cut at least ten feet in length along the vein, and it must appear from the record that this has been done. A failure to observe these requirements is fatal to the location, for the record cannot be supplemented by proof of what was actually done. (*Hahn v. James, supra.*)

The court was in error in overruling defendants' objection, because the statement, not being in compliance with the law, was wholly immaterial to establish plaintiffs' title, and the judgment must for that reason be reversed. Since the exclusion of this evidence would have been conclusive of plaintiff's case, and since it cannot be aided by proof, it is not necessary to order a new trial. The result of a new trial would necessarily be a judgment in favor of defendants.

It is therefore ordered that the judgment be reversed, and that the cause be remanded, with directions to the district court to enter judgment for defendants.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

MARTIN, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

34	281
35	237

(No. 2,267.)

(Submitted June 6, 1906. Decided June 11, 1906.)

Personal Injuries—Municipal Corporations—Sidewalks—Pleadings—Parent and Child—Instructions—Presumptions—Trial—Special Findings.

Personal Injuries—Pleadings—Complaint.

1. To support a judgment, in an action for personal injuries, in favor of plaintiff, the complaint must state facts sufficient to constitute a cause of action against the defendant *and in favor of the plaintiff.*

Same—Complaint—Parent and Child.

2. Under Code of Civil Procedure, section 578, the complaint, in an action brought by the mother of a child to recover damages for personal injuries sustained by the latter, must set forth that the father was dead or had deserted his family at the time the action was commenced, and in the absence of such allegation the complaint fails to state a cause of action in favor of the mother of the child.

Same—Cities and Towns—Defective Sidewalks—Instructions.

3. An instruction, given in an action to recover damages from a city for personal injuries alleged to have been sustained by reason of a defective sidewalk, telling the jury that it was the duty of the city to see to it that its streets and sidewalks are kept in a safe condition, and, failing in this, it becomes liable to persons injured by reason of such failure, was erroneous, in that it practically made the city an insurer of the safe condition of its streets and sidewalks, whereas it is only compelled to keep its thoroughfares in a reasonably safe and good condition for travel.

Instructions—Error—Prejudice—Presumptions.

4. In the absence of anything to show that prejudice could not reasonably have followed the giving of an erroneous instruction, and the error appearing, prejudice will be presumed.

Findings—Actions at Law—District Courts.

5. In an action at law the findings of the jury are binding upon the court.

Trial—District Courts—Setting Aside Special Findings.

6. Under Code of Civil Procedure, section 1101, providing that, where a special finding of fact is inconsistent with the general verdict, the former controls and the court must give judgment accordingly, it may not set aside a special finding and enter judgment on the general verdict, but must enter judgment on the special finding, leaving it to the defeated party to pursue his remedy by a motion for a new trial.

Appeal from District Court, Silver Bow County; J. B. McClerman, Judge.

ACTION by Mary Pryor Martin against the city of Butte. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Mr. L. P. Forestell, and Mr. J. F. Davies, for Appellant.

Mr. C. N. Davidson, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff, Mary Pryor Martin, commenced this action against the city of Butte to recover damages for personal injuries sustained by her son, William Pryor, five years old, which injuries the plaintiff contends were caused by the negligence of the city of Butte. The answer denies the allegations of the complaint and pleads contributory negligence on the part of the plaintiff and on the part of the said William Pryor. A reply was filed denying the new matter set forth in the answer. The cause was tried to the court sitting with a jury. The jury returned a general verdict in favor of the plaintiff and answered certain special interrogatories submitted by the court. Upon motion of counsel for plaintiff the court rejected special finding No. 14, and entered judgment on the general verdict and other special finding in favor of the plaintiff, from which judgment defendant appealed.

The only questions which require attention here are: 1. Does the complaint state a cause of action in favor of the plaintiff? 2. Did the court err in giving instruction No. 5, asked by plaintiff? And 3. Did the court err in setting aside special finding No. 14?

1. It will not do to say that it is sufficient that the complaint states a cause of action against the defendant. To support this judgment the complaint must state facts sufficient to constitute a cause of action against the defendant *and in favor of the plaintiff*. (*Farris v. Jones*, 112 Ind. 498, 14 N. E. 484, and cases cited.)

In order to maintain this action the plaintiff must bring herself within the provisions of section 578 of the Code of Civil Procedure, which section, so far as applicable to this case, reads as follows: "Sec. 578. A father, or in case of his death, or desertion of his family, the mother, may maintain an action for the injury or death of a minor child." The complaint does not anywhere allege that the child's father was dead or had deserted his family at the time this action was commenced, and, in the absence of such allegation, the complaint does not state a cause of action in favor of the mother of the child. The provisions of the statute quoted above appear too plain to require discussion. A statute similar to our section 578, above, was directly passed upon in *Louisville etc. Ry. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. 449, and the doctrine announced above fully sustained.

The state of Arkansas also has a statute similar to section 578, above, which provides: "Where the person killed or wounded be a minor, the father, if living; if not, then the mother; if neither be living, then the guardian—may sue for and recover such damages as the court or jury trying the case may assess." In *St. Louis etc. Ry. Co. v. Yocum*, 34 Ark. 493, it is said: "In the case of a minor killed by the running of a train, the father, if living, must sue. If the mother sues, she must show affirmatively and positively that the father is dead. Nothing short of that will answer." (See, also, *Savannah Ry. Co. v. Smith*, 93 Ga. 742, 21 S. E. 157.) This disposes of the like objection made to instructions 1 and 2 given.

2. Instruction No. 5, given to the jury at the instance of the plaintiff, is as follows: "Instruction No. 5. The jury are instructed that it is the duty of the city of Butte to see to it that the streets and sidewalks within the corporate limits of the city are kept in a safe and passable condition, and, failing in this duty, then the city is and becomes liable to parties who may sustain injury or damages by reason of such failure of the city to keep the streets and sidewalks in a safe condition; and you are instructed that if you believe from the evidence that

the sidewalk described in the complaint herein was permitted by the city to remain in a dangerous condition by the city authorities, and that by reason of the sidewalk being in a dangerous and unprotected condition, the minor son of the plaintiff fell into an excavation made underneath the defendant's sidewalk, and received an injury thereby, which injury caused damages to the plaintiff, then your verdict should be for the plaintiff for such damages as she sustained."

This instruction practically makes the city an insurer of the safe condition of its streets, sidewalks, and crossings. It does not state the law correctly, and, in the absence of anything to show that prejudice could not reasonably have followed the giving of such an instruction, the error appearing, prejudice will be presumed.

In *Leonard v. City of Butte*, 25 Mont. 410, 65 Pac. 425, the rule of law applicable to cases of this character is correctly stated as follows: "We understand the rule to be that a city is bound only to use reasonable care to keep its streets and sidewalks in a reasonably safe and good condition for travel (Dillon on Municipal Corporations, sec. 1019), exercising reasonable care in inspecting them to discover any defects therein (Id., sec. 1025). Having observed both of these precautions, reasonable attention being had to the effects of natural deterioration and decay, the authorities will have discharged their full duty." (See, also, *Anderson v. Northern Pac. R. Co.* [decided April 30, 1906], 34 Mont. 181, 85 Pac. 884.)

3. Special finding No. 14 is as follows: "Special finding No. 14. Was the accident caused in whole or in part by the failure of William Pryor to exercise such care as a person of ordinary prudence would have exercised under like circumstances? Answer: Yes. A. W. Williams, Foreman." We question the propriety of submitting this special interrogatory to the jury in this particular case; but, it having been submitted and answered and returned by the jury, the district court was without authority to set it aside. In an action at law, such as this, the findings of the jury are binding upon the court. This

particular finding was wholly inconsistent with a general verdict in favor of the plaintiff, and in such a case the special finding governs. Section 1101 of the Code of Civil Procedure, among other things, provides: "Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." It was the duty of the court in this instance to enter judgment upon the special finding, and thereafter the remedy of the defeated party was by motion for new trial.

For the errors appearing, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing opinion.

BARTELS, RESPONDENT, v. DAVIS ET AL., APPELLANTS.

(No. 2,268.)

(Submitted June 7, 1906. Decided June 22, 1906.)

Mortgages—Foreclosure—Contracts—Separate Instruments—Construction—Pleadings—Issues Raised.

Contracts—Separate Instruments—Construction—Mortgages.

1. Where a note, deed and defeasance were all executed at the same time, had reference to the same subject matter, and were a part of the same transaction, the deed being intended as a mortgage to secure the note, the three instruments should be construed as one, as provided by Civil Code, section 2207.

Notes—Maturity—Rights of Payee.

2. Upon the maturity of a note the payee has an absolute right to demand payment of the debt in full, and he may not legally be compelled to accept a part payment only.

Mortgages—Defeasance Agreement—Obligation of Mortgagee.

3. Defendants, on May 14, 1903, executed a note to plaintiff, due six months after date. Defendants also executed a deed conveying

a number of lots to plaintiff to secure the note, and plaintiff executed a defeasance agreement reciting that, one of the defendants desiring to sell from time to time "during the life of this agreement" certain portions of the property conveyed, plaintiff would convey to any purchaser so obtained, on receipt of fifty dollars per lot, to be applied on the note. *Held*, that the phrase "during the life of this agreement" was intended to designate the period of time during which the defendants, without having breached the contract themselves, might rightfully have demanded performance of its terms by the other party to it, to-wit, six months after May 14, 1903, or to and including November 14th, and that plaintiff was not bound, on November 15th, to either accept a partial payment of the debt due or convey a portion of the mortgaged property.

Pleadings—Answer—Denial—Issues.

4. A denial, in an answer to a complaint to foreclose a mortgage, that there was anything due to plaintiff at the time of the commencement of the action, is the denial of a mere conclusion of law, and does not raise any issue.

Pleadings—Admission of Material Allegations—General Denial—Effect.

5. Where the answer to a complaint in a foreclosure suit admits all the material allegations of the complaint, a general denial is of no legal effect.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by E. J. Bartels against Vernie A. Davis and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Messrs. McBride & McBride, for Appellants.

The life of the note extends for eight years after its maturity, unless sooner extinguished by payment, or merged in a judgment. The life of the Bartels agreement to reconvey extends for eight years after its date, the time within which an action could be maintained thereon, or until said agreement had been merged in a judgment. The limitation of the statute is the same for each. The note has no advantage over the agreement. The writings are, before the law, of equal dignity. We submit the following as illustrating the meaning of the term "life of agreement": Mr. Webster, in his dictionary, published in the year 1891, gives the following definition of the word "life": "Life of an execution; the period when an execution is in force, or before it expires." (Webster's Dictionary, 1891, p. 663.) "Life, the period of efficient force; as, the life of a part-

nership; life of a lease; life of a ship." (Standard Dictionary, p. 1028.) "Reviving; to impart new life; to renew; to make operative once more; to restore original force to; as, to revive a debt, a suit, a judgment. Revival; the act of giving new life or efficiency to that which has lain dormant, been abated, or has or will become outlawed." (Anderson's Dictionary of Law, p. 902.) "The life of a judgment is the period within which it may be enforced. This limitation is prescribed by statute." This definition of the life of a judgment is illustrated in the case of *Peters v. Vawter*, 10 Mont 201, 25 Pac. 438.

Mr. J. J. Lynch, and Mr. Peter Breen, for Respondent.

The first defense contained in the answer of the defendants, after admitting the execution and delivery of the note and mortgage described in the complaint, and that the note has not been paid, denies that there is anything due on the said note. The pleading is clearly vicious, frivolous and insufficient. (*Hook v. White*, 36 Cal. 299; *Power v. Gum*, 6 Mont. 5, 9 Pac. 575; *Stewart v. Budd*, 7 Mont. 573, 19 Pac. 221; *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767; *Columbia Nat. Bank v. Western I. & S. Co.*, 14 Wash. 162, 44 Pac. 145; 2 Estee's Pleadings, sec. 3508.)

The contract, standing alone, is of indefinite duration, and ordinarily a contract of indefinite duration may be terminated at the pleasure of either party to it. (*Cumberland Valley R. Co. v. Gettysburg etc. Ry. Co.*, 177 Pa. St. 519, 35 Atl. 952; *St. Louis etc. Ry. Co. v. Mathews*, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467; *Sullivan v. Detroit etc. Ry. Co.*, 135 Mich. 661, 106 Am. St. Rep. 403, 98 N. W. 756, 64 L. R. A. 673; *Christensen v. Pacific Coast Borax Co.*, 26 Or. 302, 38 Pac. 127; *Barney v. Indiana Ry. Co.*, 157 Ind. 228, 61 N. E. 194; *Chattanooga etc. Ry. Co. v. Cincinnati etc. Ry. Co.*, 44 Fed. 456; *Vicksburg Liquor & Tobacco Co. v. United States Exp. Co.*, 68 Miss. 149, 8 South. 332; *Baldwin v. Kansas City etc. Ry. Co.*, 111 Ala. 515,

20 South. 349; *Lawrence v. Robinson*, 4 Colo. 567; *Irish v. Dean*, 39 Wis. 562; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Cumberland Bone Co. v. Atwood Lead Co.*, 63 Me. 167; *Butler v. Smith*, 35 Miss. 457; *Echols v. New Orleans etc. R. Co.*, 52 Miss. 610; *Davis v. Barr*, 12 N. Y. St. Rep. 111; *Coffin v. Landis*, 46 Pa. St. 426; *Beers v. North Milwaukee Townsite Co.*, 93 Wis. 569, 67 N. W. 936; *Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563.) But in order to ascertain the true intention of the parties the contract and note, being practically contemporaneous instruments between the same parties, one referring to the other, relating to the same subject matter and parts of one transaction, must be construed together. (Civ. Code, Mont., sec. 2207; Lawson on Contracts, sec. 389; *Meyer v. Weber*, 133 Cal. 861, 65 Pac. 1110; *Talbott v. Heinze*, 25 Mont. 4, 63 Pac. 624; *Cornish v. Wolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 5.)

It is apparent that the agreement expired on the fourteenth day of November, 1903, the day the note matured. The time the note had to run fixed by the plainest implication the duration of the contract. (*Cumberland Valley Ry. Co. v. Gettysburg etc. Ry. Co.*, 177 Pa. St. 519, 35 Atl. 952.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On May 14, 1903, Vernie A. Davis and Sewell W. Davis executed and delivered to E. J. Bartels their promissory note for \$300, due six months after date, with interest at two per cent per month, and to secure the payment of said principal and interest at the same time executed and delivered to Bartels a deed, absolute on its face, conveying to him a large number of city lots located in the city of Butte. Contemporaneously with the execution of the note and deed there was executed by Bartels and Vernie A. Davis a defeasance agreement which refers to the note and deed, declares that the deed was intended only as security for the payment of the \$300 and interest represented by the note, and then contains these recitals:

"Whereas, the said Vernie A. Davis desires the right to sell from time to time during the life of this agreement, such portions of said property as she may be able to find a purchaser for, it is agreed, by and between the parties hereto, that upon the said Vernie A. Davis finding a purchaser for any one or more of the said lots hereinabove described, that the said first party will make, execute and deliver to the purchaser thereof, a proper conveyance, transferring said lot to said purchaser, upon the said Vernie A. Davis paying to the said E. J. Bartels, for each lot so sold the sum of fifty (\$50.00) dollars, the said amount paid to apply upon the note hereinabove referred to.

"It is further expressly understood and agreed, that in the event of the said Vernie A. Davis paying or causing to be paid to the said E. J. Bartels, the amount of the said note, principal and interest, that thereupon the said E. J. Bartels will reconvey to the said Vernie A. Davis or to the party named in writing by her, all of the real property hereinabove described, which shall not at said time have been sold under the terms of this contract hereinabove contained."

On November 25, 1903, Bartels commenced this action to foreclose the mortgage, alleging that the deed was intended to be and was in fact a mortgage, and that no part of the principal or interest represented by the note had been paid. The complaint is in the usual form. The defendants answered admitting the due execution and delivery of the note and deed; that the deed was understood to be a mortgage, and that no part of the principal or interest represented by the note and secured by the mortgage had been paid. The answer contains a denial that there is anything due to the plaintiff from the defendants, or either of them, and a general denial of all the allegations of the complaint not specifically admitted or denied. The answer then sets forth as an affirmative defense the facts that the defeasance agreement was executed as herein set forth; that on November 15, 1903, a purchaser was procured for two of the lots described in the deed; that thereupon \$100 was tendered to Bartels and demand was made upon him that he execute to

such purchaser a deed for said lots; that Bartels refused to do so and claimed that he (Bartels) was the owner of the lots; and that by reason of Bartels' refusal to accept such tender and convey said lots and otherwise comply with the terms of such defeasance agreement, the defendant Vernie A. Davis suffered damages in the sum of \$1,000. The prayer of the answer is that Vernie A. Davis be decreed to be the owner of the lots described in the deed and entitled to a conveyance thereof from Bartels, that she recover judgment against him for \$1,000, and that he be adjudged not entitled to recover any sum of money whatever from either of the defendants. Plaintiff thereupon moved for judgment on the pleadings, upon the ground that the answer is frivolous, that it does not contain any denial of any material allegation of the complaint; and that it does not state facts sufficient to constitute a defense or counterclaim. This motion was sustained and judgment entered on the pleadings in accordance with the prayer of the complaint. From that judgment the defendants appealed.

In that portion of the defeasance quoted above, appears this language: "Whereas, the said Vernie A. Davis desires the right to sell from time to time during the life of this agreement," etc. The only question propounded for our solution is: What does the phrase "during the life of this agreement" mean? Appellants earnestly contend that the life of the agreement extended over a period of eight years—the period fixed by the statute of limitations for the enforcement of the contract by plaintiff—or until the agreement was extinguished by payment of the debt or was merged in a judgment.

The note, deed, and defeasance all relate to the same matter and are to be taken and construed together. (Civil Code, sec. 2207.) It is not contended that the defeasance agreement had the effect of extending the time for the maturity of the note. It is conceded that the note matured on November 14, 1903. The note, deed, and defeasance all refer to the same subject matter, and, in contemplation of law, constitute one agreement. (*Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598,

81 Pac. 4; 7 Cyc. 582, and cases cited.) This is likewise conceded by appellants in their brief. This being so, the appellants, by their contention, place themselves in this somewhat awkward situation. In effect they say to Bartels: "We confess that we violated the terms of this agreement by our failure to pay the note on or before its maturity, but, notwithstanding our breach, we insist that you shall scrupulously keep or perform the agreement in all things by you to be kept or performed." It is elementary that upon the maturity of the note, Bartels had an absolute right to demand payment of the debt in full, and it would be altogether absurd to say at the same time, that he could be legally compelled to accept a part only.

The one thing which the appellants bound themselves to do by this contract was to pay Bartels \$300 with interest on or before November 14, 1903, and with respect to this they wholly failed to keep their agreement. The term or duration of the contract, so far as the Davises were concerned at least, was fixed at six months, or to and including November 14th. In view of these considerations, and in the absence of anything to indicate a contrary purpose, we hold that when the phrase "during the life of this agreement" was used, it was intended to designate the duration of the agreement, that is, the period of time during which the appellants, without having breached the contract themselves, might rightfully demand performance of its terms by the other party to it. Bartels was not bound to accept a partial payment of the debt after the maturity of the note, and the duty imposed upon him to execute the deed for the lots being conditioned upon the payment to him of \$50 for each lot so sold, there was, therefore, no obligation whatever resting upon him to execute the deed for the two lots on November 15, 1903, after the debt had matured and the time had arrived when he could rightfully demand payment in full.

It goes without saying that the provision for payment to Bartels of \$50 for each lot sold as a condition precedent to his making a deed means payment at such time and under such circumstances that he was legally bound to accept it. As he was

not under obligation to accept a partial payment after the maturity of the note, he did not violate any legal right of the appellants in refusing acceptance and refusing to execute the deed, and therefore his refusal could not give rise to any claim for damages.

What is here said is to be understood only in view of the matters disclosed by this record. Whether the tender made before suit was brought, if kept good, would have operated to stop the interest on the \$100, need not be considered. The answer does not allege that the tender was kept good. The denial that there was anything due to the plaintiff at the time of the commencement of this action is the denial of a mere conclusion of law, and does not raise any issue. Neither was the general denial in the answer of any effect, for the answer admits all the material allegations of the complaint.

We are of the opinion that the answer did not state any defense or counterclaim, and that the court properly rendered judgment on the pleadings. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing opinion.

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BLANKENSHIP ET AL., RESPONDENTS, v. DECKER ET AL.,
APPELLANTS.

(No. 2,294.)

(Submitted June 6, 1906. Decided June 12, 1906.)

*Brokers—Commissions—Pleadings—Counts—Quantum Meruit—
Contracts—Construction—Presumptions.*

Pleadings—Causes of Action—Counts.

1. Under Code of Civil Procedure, section 672, the trial court may, in its discretion, permit the same cause of action to be stated in different counts in order to meet the exigencies of the case as presented by the evidence.

Brokers—Contracts—Pleadings—Proof.

2. Though a contract authorizing a broker to sell real estate must be in writing and subscribed by the party to be charged or his agent (Civil Code, sec. 2185, subsec. 6), the fact that it is in writing is a matter of proof and not of allegation in pleading.

Express Contracts—*Quantum Meruit*.

3. *Obiter*: Upon the complete performance of an express contract for services at a stipulated compensation, a recovery may be had upon a *quantum meruit*.

Brokers—Contracts—*Quantum Meruit*—Demurrer—Harmless Error.

4. Where, in an action to recover for services alleged to have been performed as brokers to sell real estate, plaintiffs at the opening of the trial abandoned a count in their complaint based upon a *quantum meruit*, introduced no proof in support of it, and the trial proceeded upon the issues presented by the answer to a count based on a written contract, and the instructions of the court were formulated accordingly, the error of the court in overruling a special demurrer to the count based upon the *quantum meruit*, if error, was harmless.

Brokers—Contracts—Construction—Instructions.

5. Where the attendant facts and circumstances in the making of an agreement are resorted to as an aid to an understanding of it, no greater burden rests upon the promisor than to show by a preponderance of the evidence that the promisee understood it as he (the promisor) believed he understood it (Civil Code, sec. 2214); and instructions, submitted in an action to recover for services as brokers to sell real estate which advised the jury that plaintiffs' (promisees') right of recovery depended upon whether they understood the contract in question in a certain way, laid down an erroneous rule of law.

Brokers—Contracts—Uncertainty—Presumptions—Instructions.

6. While, under section 2219, Civil Code, in the absence of proof the presumption will be indulged that the promisor caused any ambiguity or uncertainty in the terms of a written contract, yet where the evidence introduced permits the inference that the promisee wrote the agreement and himself selected the terms employed therein, this presumption gives way to the contrary one that the latter caused the uncertainty, and the burden rests upon him to remove it; and the district court, in an action to recover for services alleged to have been rendered as brokers to sell real estate, should have given appellants' (promisors') requested instruction embodying this principle, where the evidence tended to prove that one of them went to plaintiffs' office and procured a member of the brokerage firm to write a memorandum agreement, composing it himself, but following the client's wishes.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

ACTION by E. V. Blankenship and P. J. Davies against Minnie F. Decker and others. From a judgment in favor of plaintiffs and from an order denying their motion for a new trial, defendants appeal. Reversed and remanded.

Messrs. Hartman & Hartman, for Respondents.

The contention of appellants is that the *quantum meruit* count is bad because it does not specifically allege that there was a contract in writing under which the services were performed, and that no proof of a contract in writing could be made under it, and that therefore it was error for the court to overrule the demurrer to the *quantum meruit* count and for misjoinder of the two counts, and also error to overrule the objection to any testimony being given under the *quantum meruit* count. Whether or not a contract is in writing is a matter of proof and not of allegation in the pleadings. (*Hefferlin v. Karlman*, 29 Mont. 139-150, 74 Pac. 201; *Mayger v. Cruse*, 5 Mont. 485-493, 6 Pac. 333; *Sweetland v. Barrett*, 4 Mont. 217, 222, 223, 1 Pac. 745.)

It seems to be well settled that whether or not there is a contract in writing to support a broker's claim for his commissions is entirely a question of proof. The supreme court of Colorado holds that it is a matter of discretion for the court in such cases to permit a *quantum meruit* count for a reasonable compensation and a count upon the contract. (*Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836.) The supreme court of Nevada holds that the suit may be on the *quantum meruit* alone and proof of the written contract be made thereunder and recovery had. (*Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025, 1026.)

The holding of the California courts is universal that where the cause of action is upon a written contract, the case may be stated in two counts: one on the contract and one on the *quantum meruit* or the *quantum valebat*. (*Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Remy v. Olds*, 88 Cal. 537, 540, 541, 26 Pac. 355; *Cowan v. Abbott*, 92 Cal. 101, 28 Pac. 213; *Manning v. Dallas*, 73 Cal. 420-422, 15 Pac. 34; *Wilson v. Smith*, 61 Cal. 209. See, also, Abbott's Civil Trial Brief, p. 83; Bliss on Code Pleading, 3d ed., sec. 120. See, also, *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709.)

Messrs. Walrath & Patten, for Appellants.

Instruction No. 13 advises the jury that whether or not the indorsement made upon the contract on October 7, 1903, was a withdrawal of the authority of the plaintiffs to sell the land, depends upon whether the plaintiffs so understood it at the time. Precisely the reverse is the law in this state. Section 2214 of the Civil Code is identically the same as section 1649 of the Civil Code of California, which has been construed and applied in the following cases: *Ennis Brown Co. v. Hurst*, 1 Cal. App. 752, 82 Pac. 1056; *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391; *Balfour v. Fresno Canal etc. Co.*, 109 Cal. 221, 41 Pac. 877; *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325. See, also, *Wells v. Carpenter*, 65 Ill. 447; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337.

Requested Instruction No. 11 would have instructed the jury that when one of the parties to a contract in writing draws the contract, any ambiguity in any of its terms is to be construed more strongly against the party so drawing the instrument. That the court erred in its refusal to give this instruction does not seem to admit of doubt. The instruction states, not only the common law, but, likewise, the statutory law of this state. Nothing approaching a statement of the principle was embodied in any other instruction, and the importance of its bearing on the case, and the prejudice to defendants which must have resulted from its refusal, are evident. (9 Cyc. 590; *Bickford v. Kirwin*, 30 Mont. 1, 75 Pac. 520; *Welch v. British-American Assur. Co.*, 148 Cal. 223, 82 Pac. 964; *Keith v. Electrical Eng. Co.*, 136 Cal. 178, 68 Pac. 598; *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 53 Am. St. Rep. 658, 42 N. E. 546, 30 L. R. A. 719; *Livingston v. Arrington*, 28 Ala. 424; *Barney v. Newcomb*, 63 Mass. (9 Cush.) 46; *McCarty v. Howell*, 24 Ill. 341; *White v. Smith*, 33 Pa. St. 186, 75 Am. Dec. 589; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 266, 48 Am. Rep. 205; *Richardson v. People*, 85 Ill. 495; *Leslie v. Bell*, 73 Ark. 338, 84 S. W.

491; *Rankin v. Rankin*, 111 Ill. App. 403; *Harley v. Sanitary District of Chicago*, 107 Ill. App. 546; *Kohlsaot v. Illinois Trust etc. Union*, 102 Ill. App. 110; *Muller v. Northwestern University*, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. W. 110; *Lassing v. James*, 107 Cal. 348, 40 Pac. 535.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover the sum of \$480, alleged to be due plaintiffs' as commissions on the sale of two hundred and forty acres of agricultural land and appurtenances, situate in Gallatin county, with interest from the date of sale, under an agreement in writing dated September 28, 1903, the terms of which are in substance the following: The plaintiffs were given sole power of sale. They were to pay all expenses of examination by proposed customers and of all advertising, and to have as compensation all the selling price over the fixed minimum of \$38 per acre; the purchase money to be paid part in cash and part in deferred payments, with interest. Certain encumbrances were to be assumed by the purchaser, and in case the defendants revealed the terms of the agreement, so that a sale was defeated or delayed, or if they sold the land themselves at a lower price or on more advantageous terms than those specified, the plaintiffs were to have five per cent commission. One clause of the agreement is the following: "Authority to sell said land is continued for twelve months and until specially withdrawn in writing."

The complaint contains two counts. The first declares upon the written agreement, alleging that on September 28, 1903, the plaintiffs negotiated a sale at the price of forty dollars per acre, whereby there became due and payable to them the sum claimed, but that the defendants wrongfully and in violation of their agreement refused to pay the same, or any portion thereof. The second declares upon a *quantum meruit*, alleging

that the amount claimed is due as the reasonable value of the services rendered by plaintiffs in effecting the sale.

A special demurrer was interposed to the complaint, the ground thereof being that two causes of action, the first upon an express agreement conferring authority to sell real estate, and the second upon a *quantum meruit*, were improperly united, since the services alleged in both causes of action were the same. This having been overruled, the defendants answered, admitting the execution of the agreement, but denying all other allegations of the complaint. It was then alleged affirmatively that on October 7, 1903, and while the agreement was still in force, it was by mutual agreement of the parties abandoned and a substitute modification of it made in writing, indorsed thereon, as follows:

“Bozeman, Montana, Oct. 7, 1903.

“This is to state that we will take \$35.00 per acre, net to us, for our farm, described above, if sold within the next 30 days, the purchaser to pay the \$300.00 interest on mtg. now on hand. If not sold in 30 days, we will not sell. We would like all cash if possible.

(Signed) “MINNIE F. DECKER.”

As an additional defense the defendants pleaded and relied upon subdivision 6 of section 2185 of the Civil Code, which declares that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid, unless it be in writing, subscribed by the party to be charged or his agent.

The reply admits that the parties made the agreement embodied in the answer at the date named, but alleges that it was understood by the parties at the time to modify the original agreement, so as to permit a sale at a reduced price for thirty days only, and that thereafter the original agreement should revive and continue in force according to its terms for twelve months and until the authority granted should be revoked by notice in writing. The case is before us on appeal from the

judgment in favor of plaintiffs and an order denying defendants' motion for a new trial.

The theory of the parties and of the court was that the language of the memorandum dated October 7th, particularly in the expression, "if not sold in thirty days, we will not sell," is ambiguous, and should be interpreted by the aid of proof of the circumstances under which it was executed and the behavior of the parties with reference to it; no question being made as to the binding character of it, though signed by Mrs. Decker alone. The questions presented for review are whether the court erred to the prejudice of the defendants in overruling the demurrer and in instructing the jury.

That the court may, in its discretion, under Code of Civil Procedure, section 672, permit the same cause of action to be stated in different counts in order to meet the exigencies of the case as presented by the evidence (*Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213), counsel for defendants concede, but argue that since the cause of action herein arose out of a contract of employment to sell real estate, which must be evidenced by a writing, no recovery may be had upon a *quantum meruit* for the services rendered thereunder, and hence that it was error to permit the second count to stand, since it unnecessarily complicated the case and probably confused the jury upon the trial.

In so far as the court held that a recovery may be had upon a *quantum meruit* in this character of a case, we think there was no error. The rule is well settled that though a contract, to be valid under the statute (Civil Code, sec. 2185, *supra*), must be evidenced by a writing and subscribed by the party to be charged or his agent, the fact that it is in writing is a matter of proof and not of allegation in pleading (*Sweetland v. Barrett*, 4 Mont. 217, 1 Pac. 745; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333; *Hefferlin v. Karlman*, 29 Mont. 139, 4 Pac. 201); and upon a complete performance of an express contract for services at a stipulated compensation, there seems to be no sound reason why

a recovery may not be had upon the *quantum meruit*. (*Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025; *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709; *Fells v. Vestvali*, 2 Keyes (N. Y.), 152.) In such case the effect of proof of the express contract is to make the stipulated compensation the *quantum meruit* in the case; and, the fact that it must be evidenced by a writing being a matter of proof and not of pleading, the form of the pleading does not affect the merits.

But, conceding that the demurrer should have been sustained, we do not think the appellants can now complain of the court's action in the premises. At the opening of the trial the plaintiffs abandoned the second count entirely and introduced no proof in support of it. The trial was had upon the issues presented by the answer to the first count only, and the instructions submitted to the jury were formulated accordingly. It is apparent, therefore, that the error, if it was error, was one for which this court may not reverse the judgment. (Code Civ. Proc., sec. 778.) Evidently the jury could not have been misled, since plaintiffs failed to introduce proof in support of this count, and the court's instructions impliedly excluded it from their consideration.

Among the instructions submitted are the following: "You are instructed that whether or not the indorsement made upon said contract on the seventh day of October, 1903, was a withdrawal of the authority of the plaintiffs to sell the land, depends upon whether the plaintiffs so understood it at the time. The defendants would not have any right to withdraw the authority given by said written contract from the plaintiffs until after twelve months from the twenty-eighth day of September, 1903, except for some cause which is not claimed here; and unless it was understood and acquiesced in by the plaintiffs that said indorsement of October 7, 1903, was a complete withdrawal of their authority to further attempt to sell the land under the contract after thirty days therefrom, such indorsement cannot have that effect. The mere desire of the defendants to withdraw the authority of the plaintiffs, granted by said contract,

held or expressed at that time or any subsequent time, could not have the effect to so withdraw it, and unless there was complete acquiescence by the plaintiffs in such expressed desire on the part of the defendants (if the desire was so expressed) the contract was not affected by the indorsement." (Instruction No. 13.)

"The court instructs that there is only one writing in evidence that can be considered by you as a possible withdrawal of the authority granted the plaintiffs by the written contract to sell the land, and that is the writing indorsed thereon on October 7, 1903; and whether or not said writing had the effect to withdraw the authority of plaintiffs after thirty days depends entirely upon whether or not the plaintiffs so understood its effect. The defendants had no right to withdraw it without the consent of the plaintiffs, and it devolves upon the defendants to satisfy your minds by a fair preponderance of the proof and that plaintiffs so understood it." (Instruction No. 16.)

The complaint made of these instructions is that they advised the jury that plaintiffs' right of recovery depended upon whether they understood the indorsement of October 7, 1903, was a withdrawal of their authority, whereas the rule applicable is that laid down in section 2214 of the Civil Code, as follows: "If the terms of the promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." This criticism is just. The plaintiffs were the promisees. In the absence of proof of the attendant facts and circumstances admitted in aid of the construction of an agreement, any ambiguity or uncertainty therein must be construed most strongly against the party who caused the ambiguity or uncertainty, and the presumption is indulged that the promisor caused it. (Civil Code, sec. 2219.) In such case the presumption is against the promisor, and the contract should be construed most strongly against him. But, when the attendant facts and circumstances are resorted to as an aid to

burden rests upon the promisor than to show by a preponderance of the evidence that the promisee understood it as he (the promisor) believed he understood it. He is not required to show by a preponderance of the evidence what the promisee in fact understood.

Clearly, then, the theory of these instructions, particularly of the latter, is wrong, in that it distinctly cast upon the defendants—the promisors—the burden of showing by a preponderance of the evidence that the plaintiffs understood the agreement to mean what the defendants accepted as its true meaning. The point at issue was, not what the promisees understood, but what the promisors believed they understood—a different question from the one submitted in the instructions. The instructions refer wholly to the mental condition of the promisees, while the correct rule involves the inquiry: What did the promisors, at the time the agreement was executed, believe the promisee understood this to mean?

The defendants requested the court to submit the following instruction: "You are instructed that, when one of the parties to a contract in writing draws the contract, any ambiguity in its terms is to be construed more strongly against the party so drawing the instrument." It is said that the refusal of this instruction was prejudicial error. While, under section 2219, *supra*, in the absence of proof, the presumption must be indulged that the promisor caused any ambiguity or uncertainty in the terms of the agreement, when the evidence permits the inference—as it does in this case—that the promisee wrote the agreement, selecting himself the terms employed therein to express the understanding of the parties, this presumption gives way to the contrary presumption, that the promisee caused the uncertainty, and the burden is upon him to remove it. If he do not, the uncertainty must be resolved against him.

The instruction requested embodies the familiar principle recognized by the courts generally, of which the statute is but declaratory. (*Bickford v. Kirwin*, 30 Mont. 1, 75 Pac. 518; *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292; *Wilson*

v. *Cooper* (C. C.), 95 Fed. 625; *Allen-West Com. Co. v. People's Bank* (Ark.), 84 S. W. 1041; *Hill v. John P. King Mfg. Co.*, 79 Ga. 105; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Noonan v. Bradley*, 9 Wall. (U. S.) 394, 19 L. Ed. 757; *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 53 Am. St. Rep. 658, 42 N. E. 546, 30 L. R. A. 719; 9 Cyc. 509.)

The evidence shows that at the time the memorandum was written Mrs. Decker went to the office of the plaintiffs and told Davies of the change she desired made. He thereupon wrote the memorandum to express the change. He says: "I sat down and wrote this second contract, and asked Mrs. Decker to sign it. I don't think I wrote it, using her language, but to follow her wishes. I think I composed it myself, and asked her if it was all right—following her wishes. When I used the language, 'we will not sell' and 'we would like all cash if possible,' I think I was following the language, or approximately so, that she had given me." These facts, which were not disputed, warranted the submission of an instruction embodying the rule stated in the one requested, in the same connection also leaving it to the jury to determine whether, in the use of the expressions, "we will not sell" and "we would like all cash if possible," Davies used terms dictated by Mrs. Decker; for the evidence might justify the conclusion that he did. If such were the case, plaintiffs were not responsible for any uncertainty in these expressions, and were entitled to be relieved of the presumption to be otherwise indulged against them upon the theory that Davies selected these expressions.

Generally, throughout the instructions the court, in referring to the memorandum of October 7th, used the term "withdrawal." While a substituted agreement would in effect have been the same as a withdrawal of the authority granted under the original agreement, the use of this term was not entirely appropriate. The real inquiry was whether the parties intended the memorandum as a substitute for the original agreement, or as a modifica-

tion of it, for temporary purposes only. It was in no event an attempt to withdraw authority entirely.

We have considered this case upon the theory upon which it was tried in the district court. The question whether the terms of the agreement are in fact uncertain or 'ambiguous' was not submitted to us, and we express no opinion thereon.

For the reasons stated, the judgment and order appealed from are reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing opinion.

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STATE EX REL. COTTER ET AL., RELATORS, v. DISTRICT
COURT OF SECOND JUDICIAL DISTRICT ET AL., RE-
SPONDENTS.

(No. 2,303.)

(Submitted June 5, 1906. Decided June 27, 1906.)

*Certiorari—Probate Proceedings—Executors—Objections to
Final Account—Appealable Orders.*

Certiorari—Probate Courts—Executors—Objections to Final Accounts.

1. *Certiorari* does not lie to review the action of the district court, while sitting in probate, in granting a motion to strike out objections to the final account of an executrix and to a petition for distribution of the estate.

Appealable Orders—Probate Proceedings.

2. Under section 1722 of the Code of Civil Procedure, as amended by Act of 1899 (Laws 1899, p. 146), an order granting a motion to strike out objections to the final account of an executrix and to a petition for distribution of the estate, is not appealable.

Probate Proceedings—Erroneous Orders—Appeal.

3. *Obiter*: An erroneous order of the district court, while sitting in probate matters, settling the account of an executrix and directing distribution of the estate, may be reviewed on appeal, and on such appeal an error alleged to have been committed in striking out objections to the granting of the order might be considered.

ORIGINAL application by the state on the relation of John R. Cotter and another, for writ of review to annul an order of the district court of the second judicial district and Honorable Michael Donlan, a judge thereof. Dismissed.

Mr. C. M. Parr, and Mr. G. J. Langford, for Relators.

Mr. John J. McHatton, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the court.

Application for writ of review. John W. Cotter died on the twenty-ninth day of July, 1903, leaving an estate in Silver Bow county. His wife, Catherine, survived him. He left no issue by his wife. Letters testamentary were issued to the widow September 1, 1903. She was the sole beneficiary under the will. On January 4, 1905, the executrix filed a final account showing that there had been \$70,000 received and \$20,-606.93 expended, and asking that the balance be set over to her as the sole beneficiary.

On the thirteenth day of February, 1905, two minor children, called John R. Cotter and Vivian Anna Cotter, alleged to be the illegitimate children of the testator, appeared by their mother, Ada Cavelle, and prayed for the appointment of C. M. Parr, Esq., as attorney for the children in the probate proceedings. The court appointed Mr. Parr attorney as prayed. On the thirteenth day of February, 1905, the children, by the appointed attorney, filed their objections to the final account and petition for distribution. The widow, appearing in *propria persona* and as executrix, moved on February 23, 1905, to strike out the objections made by the children, giving her reasons at length.

The court answers that testimony was taken on the hearing of the motion to strike the objections, and that it appeared that there was not any writing produced to prove that the deceased had ever acknowledged the children as his.

Thereafter, on March 4, 1905, these matters all came on for hearing, and on the ninth day of April of the following year

the court made its order granting the motion to strike out the objections to the final account and the petition for distribution. The children, by their attorney, now in their petition for review declare that the court and judge thereof in granting the motion to strike out their objections exceeded jurisdiction, and further say that there is not any appeal from said order, and that they have not any plain, speedy or adequate remedy. It is true that there is not any appeal provided by law from such an order. (Session Laws, 1899, p. 146, sec. 1722, subsec. 3.)

Did the court exceed its jurisdiction or act without jurisdiction? The review upon the writ invoked in this matter cannot be extended further than to determine whether the court below regularly pursued its authority. (Code Civ. Proc., sec. 1947.) The motion to strike the objections came regularly before the court. It was considered, and the duty of the court was to grant or deny. In granting the motion it may have done wrong. But the question as to whether or not the court erred in granting the motion cannot be inquired into in *certiorari* proceedings.

An order to show cause why the writ should not issue was made by this court. If the court below should make an erroneous order settling the account of the executrix, or should err in directing distribution, an appeal may be taken, and on such appeal, the error, if any, as to the striking of the objections, might be considered. Whatever remedy the complaining party may have, it is not by writ of review.

Order to show cause quashed, and proceedings dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I agree with what is said above. I am of the opinion that relators may have relief by *mandamus*. (*Raleigh v. First Judicial District Court*, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991.)

STATE EX REL. COTTER ET AL., RELATORS, v. DISTRICT
COURT OF SECOND JUDICIAL DISTRICT ET AL.,
RESPONDENTS.

(No. 2,304.)

(Submitted June 5, 1906. Decided June 27, 1906.)

*Certiorari—Probate Proceedings—Attorneys—Appointment by
Court—Removal.*

District Courts—Probate Proceedings—Appointment of Attorneys for
Minors.

1. The district court, in its discretion, may, in probate proceedings,
under section 2925 of the Code of Civil Procedure, appoint an at-
torney for minor heirs.

Certiorari—Probate Proceedings—Order Appointing Attorney for Minors
—Vacation.

2. *Certiorari* is not the proper remedy to review an order of the
district court made in probate proceedings, vacating an order, there-
tofore made, appointing an attorney for minor heirs.

Discretion—Abuse—*Certiorari*.

3. An abuse of judicial discretion is not to act without jurisdiction
or in excess of it, so as to make it reviewable on *certiorari*.

ORIGINAL application by the state, on the relation of John R.
Cotter and another, for writ of review to annul an order of the
district court of the second judicial district and Honorable
Michael Donlan, a judge thereof. Dismissed.

Mr. C. M. Parr, and Mr. G. J. Langford, for Relators.

Mr. John J. McHatton, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the court.

Application for writ of review. On motion to quash order
to show cause why writ of review should not issue. The court
having on the thirteenth day of February, 1905, appointed
C. M. Parr, Esq., as attorney for the alleged children of one
Cotter, deceased (mentioned in the statement made in the case
of *State v. District Court et al., ante*, p. 303, 87 Pac. 614, which

see for the other facts herein), did on the ninth day of April of the next year, on motion of the executrix, vacate the order appointing Mr. Parr as such attorney.

That an attorney may be appointed, in the discretion of the court, for minor heirs in probate proceedings is apparent from what is said in *State ex rel. Eakins v. District Court*, ante, p. 226, 85 Pac. 1022, and *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174, and section 2925 of the Code of Civil Procedure.

The court was proceeding regularly in hearing and determining the motion to vacate the order appointing the attorney. As we say in the other *Cotter Case*, ante, the court may have erred and, if so, we cannot correct the wrong in this proceeding. To abuse discretion is not to act without jurisdiction or in excess of jurisdiction. It may be that these children are in fact the heirs of the deceased, and may have been lawfully acknowledged by their alleged father in writing, and therefore entitled to inherit part of the property. They should have a fair chance to prove their status in a proper proceeding. If this matter were brought before us on petition for writ of supervisory control, a different question would be presented, and, possibly, the children might be entitled to some relief from this court, but this we may not now decide.

The motion to quash the order to show cause is granted and the proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

34	308
137	223
34	308
40	134
40	252

MARTIN, RESPONDENT, v. CORSCADDEN, APPELLANT.

(No. 2,279.)

(Submitted June 8, 1906. Decided July 2, 1906.)

Malicious Prosecution—Probable Cause—Malice—Burden of Proof—Reputation—Instructions—Exemplary Damages—Appeal—Bill of Exceptions—Statutes.

Bills of Exceptions—Statements—Sufficiency—Evidence—Review.

1. Where a bill of exceptions or a statement on motion for a new trial does not point out the particulars wherein an alleged insufficiency of the evidence to justify the verdict or decision consists, the supreme court on appeal will not examine the evidence to determine its sufficiency.

Same—Statutes—Retroactive Effect.

2. The Act of 1905 (Laws 1905, c. 92, p. 185), amending sections 1152 and 1173 of the Code of Civil Procedure, so as to dispense with the specification of particulars, in bills of exceptions and statements on motion for new trial, in which the evidence is alleged to be insufficient to justify the verdict or decision, has no application to bills or statements settled prior to its enactment.

Malicious Prosecution—Evidence—Justice's Record.

3. Where, in an action for malicious prosecution, it appeared that plaintiff had been charged with larceny before a justice of the peace, a recital of the justice's docket, after the entry that defendant had been found not guilty and had been discharged, that, as there were no grounds for complaint, judgment was entered against the complaining witness, for costs, was inadmissible, whether offered as a prior adjudication of the issue on the trial or as an expression of the opinion of the justice thereon.

Trial—Reception of Evidence—Timely Objection.

4. An objection to evidence not made until after it has been admitted is too late, and, though erroneously admitted, the court is not then bound to strike it out.

Malicious Prosecution—Evidence—Reputation.

5. In an action for malicious prosecution, the justice before whom plaintiff had been tried and acquitted testified on cross-examination that he had permitted him to go at large on his promise to appear, and on re-examination, in answer to a question why he had not required bail, stated that he had "confidence" in plaintiff, and that his father had also guaranteed his appearance. *Held*, that, though such answer was immaterial, it was not prejudicial to defendant, as tending to establish plaintiff's good reputation in the community by the justice's personal opinion, his reputation not having been put in issue by plaintiff nor attacked by defendant.

Same—Probable Cause—Malice—Burden of Proof.

6. Where, in an action for malicious prosecution, the proof tends to show absence of probable cause, a *prima facie* case is made for the jury, and the burden then rests upon the defendant to rebut the same

by evidence tending to show probable cause and want of malice on his part.

Same—Evidence—Actual Guilt of Plaintiff of Act Charged—Probable Cause.

7. Actual guilt on the part of plaintiff in an action for malicious prosecution must always be established by proof beyond a reasonable doubt, while probable cause may be shown by proof of such facts and circumstances as would lead a careful and conscientious man to believe that he was guilty.

Same—Probable Cause—Plaintiff's Guilt—General Report—Proof.

8. While mere reputation or the general report of plaintiff's guilt is not sufficient to establish probable cause, in an action for malicious prosecution, it is not necessary that the defendant should have seen and conversed with the witnesses to the act charged.

Same—Evidence—Reputation of Plaintiff—Probable Cause—Mitigation of Damages.

9. In an action for malicious prosecution, evidence of the previous bad reputation of plaintiff is admissible to rebut the proof of want of probable cause and in mitigation of damages.

Same—Evidence—Reputation—Specific Acts—Offer of Proof.

10. Evidence of specific acts of larceny, said to have been committed by plaintiff in an action for malicious prosecution, in another state and not known of in the community in which he resided except by defendant and one other, was not admissible to show the general reputation of plaintiff, and an offer of proof to that effect was properly excluded.

Same—Offer of Proof—Good Faith—Confession of Plaintiff.

11. An offer of proof, by defendant in an action for malicious prosecution, for the purpose of showing his good faith and the absence of malice, that plaintiff had confessed to witness about two years prior to his arrest that he had at one time boarded at a restaurant in another state, and had been in the habit of stealing articles of silverware from the restaurant and giving them to his relatives, all of which had been communicated to defendant prior to the commencement of the prosecution, was too indefinite, in that it did not show when the confessed larcenies were committed, nor that the defendant believed the confession to be true.

Same—Advice of Attorney—Defense—Instructions.

12. An instruction given in an action for malicious prosecution that if the defendant did not make a full, fair and honest statement of all the facts in his knowledge to his counsel and act upon the advice given him thereon, but acted upon a fixed determination of his own, then such advice could not avail him as a defense, correctly stated the law.

Same—Good Faith of Defendant—Instructions.

13. Where the jury in an action for malicious prosecution were told in an instruction that if the defendant honestly believed the plaintiff guilty and acted upon such belief, and it was founded upon facts which would create a belief in a reasonable man that there was probability that the plaintiff had stolen the property in question, such instruction was as favorable to defendant as he could demand.

Same—Exemplary Damages—Pleadings—Complaint—Instructions.

14. *Held*, under section 4290, Civil Code, that in order for plaintiff to recover punitive damages, in an action for malicious prosecution, in addition to those actually sustained, it is not necessary that he claim them, *eo nomine*, in his complaint.

Same—Instructions—Exemplary Damages.

15. Where, in an action for malicious prosecution, the court had previously repeatedly charged that plaintiff was required to establish both want of probable cause and malice, which the jury must find, or return a verdict for defendant, an instruction that in such action, where defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury may award punitive damages, was not objectionable as withdrawing the element of want of probable cause from the jury.

Same—Instructions—Probable Cause—Malice.

16. Where the court, in an action for malicious prosecution, had repeatedly and correctly instructed the jury on the questions of probable cause and malice, and defendant had failed to request further specific instructions relative thereto he may not complain of those given.

Same—Damages—Excessiveness.

17. Where plaintiff in an action for malicious prosecution had been wrongfully charged with the larceny of certain hogs, arrested, tried and acquitted, a verdict for \$550 was not excessive, even though plaintiff was not committed to jail or required to give bail.

Same—New Trial—Newly Discovered Evidence—Diligence.

18. Where, in an action for malicious prosecution, defendant applied for a new trial because of newly discovered evidence concerning plaintiff's bad reputation, and defendant stated in his affidavit that before the trial he had inquired of eight persons as to his reputation "as opportunity occurred," but that they were reluctant to testify, though he was able after the trial to obtain several witnesses to prove such fact, the denial of the application for lack of diligence was not an abuse of the trial court's discretion in the matter.

New Trial—Newly Discovered Evidence—Discretion.

19. An application for a new trial on the ground of newly discovered evidence is addressed to the sound legal discretion of the trial court, and its action thereon will not be disturbed on appeal except for a clear abuse of such discretion.

New Trial—Newly Discovered Evidence—Different Result.

20. The action of the trial court in refusing an application for a new trial on the ground of newly discovered evidence will not be reversed where it is not apparent that if it were granted the result would be different from that reached in the former trial.

Appeal from District Court, Ravalli County; F. C. Webster, Judge.

ACTION by Elisha B. Martin against George Corscadden. From a judgment for plaintiff and an order denying defendant's motion for a new trial, he appeals. Affirmed.

Mr. H. L. Myers, for Appellant.

The only legitimate object of reading a criminal docket in evidence is to prove the termination of the prosecution in favor of

the accused, and when that much of it is read the reading must end. It is not even evidence of lack of probable cause. (*Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116; *Apgar v. Woolston*, 43 N. J. L. 57; *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; *Israel v. Brooks*, 23 Ill. 575; *Philpot v. Lucas*, 101 Iowa, 478, 70 N. W. 625; *Frye v. Wolfe*, 8 Pa. Super. Ct. 468; *Thompson v. Beacon Val. Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Heldt v. Webster*, 60 Tex. 207; *Cleveland etc. Ry. Co. v. Jenkins*, 75 Ill. App. 17; *McGuire v. Goodman*, 31 Ill. App. 420; *Granger v. Warrington*, 8 Ill. 299; *Casey v. Sevaton*, 30 Minn. 516, 16 N. W. 407; *Coble v. Huffines*, 132 N. C. 399, 43 S. E. 909; *Tumalty v. Parker*, 100 Ill. App. 382; *Anderson v. Keller*, 67 Ga. 58; *Chapman v. Dodd*, 10 Minn. 350; *Hinson v. Powell*, 109 N. C. 534, 14 S. E. 301; *Dempsey v. State*, 27 Tex. App. 269, 11 Am. St. Rep. 193, 11 S. W. 372; *Fletcher v. Chicago etc. Ry. Co.*, 109 Mich. 363, 67 N. W. 330; *Bays v. Herring*, 51 Iowa, 286, 1 N. W. 558.)

Individual opinions of character are incompetent and immaterial. Character evidence must always be confined to general repute. Plaintiff had the right to prove his general reputation prior to the arrest but he availed himself not of it. But he had no right to introduce the individual opinion of the justice, who seemed to be a friend. (*Dempsey v. State*, 27 Tex. App. 269, 11 Am. St. Rep. 193, 11 S. W. 372.)

Evidence of theft confessed by plaintiff to a witness is admissible in an action of this kind, as tending to show whether or not defendant had probable cause to believe plaintiff guilty of the criminal act charged and as going to the good faith and belief of defendant in regarding plaintiff as a criminal and having him arrested and as refuting the allegation of malice. It shows larcenous proclivities. (Newell on Malicious Prosecution, pp. 465-469; 3 Elliott on Evidence, sec. 2478; *Thelin v. Dorsey*, 59 Md. 539; *Lamb v. Galland*, 44 Cal. 609; *Sherwood v. Reed*, 35 Conn. 450, 95 Am. Dec. 284; *Israel v. Brooks*, 23 Ill. 575; *Barron v. Mason*, 31 Vt. 189.)

Even though advised and but partially influenced by counsel, an honest belief in plaintiff's guilt negatives malice and is sufficient. (*Goldstein v. Faulkes*, 19 R. I. 291, 36 Atl. 9; *McGuire v. Goodman*, 31 Ill. App. 420; *Ehrman v. Hoyt*, 3 Ohio Dec. 308; *Hitson v. Simms*, 69 Ark. 439, 64 S. W. 219; *Miles v. Salisbury*, 21 Ohio C. C. 333; *Lyon v. Hancock*, 35 Cal. 372; *Strehlow v. Pettit*, 96 Wis. 22, 71 N. W. 102; *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558; *Biddle v. Jenkins*, 61 Neb. 400, 85 N. W. 392.)

It is a question of law for the court to say whether or not the facts presented constitute probable cause and the court must decide that question and cannot delegate it to the jury. The jury can decide whether or not certain facts are proven by the evidence. It is wholly for the court to say whether or not those facts, if proven, constitute probable cause. (*Potter v. Seale*, 8 Cal. 217; *Grant v. Moore*, 29 Cal. 644; *Harkrader v. Moore*, 44 Cal. 144; *Emerson v. Skaggs*, 52 Cal. 246; *Eastin v. Stockton Bank*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. 491; *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542; *Atchison etc. Ry. Co. v. Watson*, 37 Kan. 773, 15 Pac. 877; *Bell v. Matthews*, 37 Kan. 686, 16 Pac. 97; *Sweeney v. Perney* (Kan.), 40 Kan. 102, 19 Pac. 328; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Smith v. Ins. Co.*, 107 Cal. 432, 40 Pac. 540; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Hess v. Oregon Ger. Baking Co.*, 31 Or. 503, 49 Pac. 803; *Markley v. Kirby*, 6 Kan. App. 494, 50 Pac. 953; *McClay v. Hicks*, 119 Mich. 65, 77 N. W. 636; *Clark v. Folkers* (Neb.), 95 N. W. 328; *Metropolitan Life Ins. Co. v. Miller*, 114 Ky. 754, 71 S. W. 921; *Boush v. Fidelity & D. Co.*, 100 Va. 735, 42 S. E. 877; *Leahy v. March*, 155 Pa. St. 458, 26 Atl. 701; *Meysenberg v. Engelke*, 18 Mo. App. 346; *Lytton v. Baird*, 95 Ind. 349; *Angelo v. Faul*, 85 Ill. 106; *Lewton v. Hower*, 35 Fla. 58, 16 South. 616; *Chrisman v. Carney*, 33 Ark. 316; Newell on Malicious Prosecution, pp. 14, 276-279.)

The law only requires defendant to disclose to counsel all of the facts within his knowledge. When he does that, the law exonerates him. (*Dunlap v. New Zealand etc. Ins. Co.*, 109 Cal. 365, 42 Pac. 29; *Hess v. Oregon G. B. Co.*, 31 Or. 503, 49 Pac. 803; *Holliday v. Holliday* (Cal.), 53 Pac. 42; *Levy v. Brannan*, 39 Cal. 485; *Biddle v. Jenkins*, 61 Neb. 400, 85 N. W. 392; *Pawlowski v. Jenks*, 115 Mich. 275, 73 N. W. 238; *Potter v. Seale*, 8 Cal. 217; *Burris v. North*, 64 Mo. 426; *Steed v. Knowles*, 79 Ala. 446; *Mesher v. Iddings*, 72 Iowa, 553, 34 N. W. 328; 3 Elliott on Evidence, sec. 2480.)

Absolute belief in guilt is not necessary to a prosecution, but if the prosecutor has good grounds to strongly suspect the guilt of the accused it is sufficient. (Newell on Malicious Prosecution, pp. 27, 28, sec. 21, p. 252, sec. 1; *Angelo v. Faul*, 85 Ill. 106; *Gardiner v. Mays*, 24 Ill. App. 627; *Cole v. Curtis*, 16 Minn. 182; *Whitfield v. Westbrook*, 40 Miss. 311; *Harpham v. Whitney*, 77 Ill. 32; *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Sisk v. Harst*, 1 W. Va. 53; *Blunk v. Atchison Ry. Co.*, 38 Fed. 311; *Plassan v. Louisiana Lottery Co.*, 34 La. Ann. 246; *Scott v. Shelor*, 28 Gratt. (Va.) 891.)

Malice is a material allegation of plaintiff's complaint to be proven by a preponderance of the evidence and not to be presumed from any one thing alone. (Newell on Malicious Prosecution, p. 247, sec. 13; *Brown v. Willoughby*, 5 Colo. 1; *Harkrader v. Moore*, 44 Cal. 144; *Rogers v. Mahoney*, 62 Cal. 611; *Griswold v. Griswold*, 143 Cal. 317, 77 Pac. 672; *Wright v. Hayter*, 5 Kan. App. 638, 47 Pac. 546; *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; *Tandy v. Riley*, 26 Ky. Law Rep. 98, 80 S. W. 776; *Bekkeland v. Lyons*, 96 Tex. 255, 72 S. W. 56, 64 L. R. A. 474; *Fugate v. Miller*, 109 Mo. 281, 19 S. W. 71.)

Reasonable ground for suspicion is sufficient cause for having a man arrested; and the prosecutor may not and does not have to believe the person arrested guilty. It is sufficient if he have good ground to strongly suspect guilt. (*Williams v. Kyes*, 9 Colo. App. 200, 47 Pac. 839; *Scrivani v. Dondero*,

138 Cal. 31, 60 Pac. 463; *Brown v. Willoughby*, 5 Colo. 1; *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119; *Gurley v. Tompkins*, 17 Colo. 437, 30 Pac. 344; *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116; *Emerson v. Skaggs*, 52 Cal. 247; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Cottrell v. Cottrell*, 126 Ind. 181, 25 N. E. 905; *Sweeney v. Perney*, 40 Kan. 102, 19 Pac. 328; *Johns v. Marsh*, 52 Md. 323; *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007; *Whitfield v. Westbrook*, 40 Miss. 311; *Meysenberg v. Engelke*, 18 Mo. App. 352; *Bulkeley v. Smith*, 2 Duer (N. Y.), 272; *Mahaffey v. Byers*, 151 Pa. St. 92, 25 Atl. 93; *Driggs v. Burton*, 44 Vt. 124.)

An instruction in an action for malicious prosecution cannot ignore the element of lack of probable cause. If it does, it is fatal. (*Sweeney v. Bienville Water Co.*, 121 Ala. 454, 25 South. 575; *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800; *Talbott v. G. W. P. Co.*, 86 Mo. App. 558; *Miles v. Salisbury*, 21 Ohio C. C. 333; *Low v. Greenwood*, 30 Ill. App. 184; *Morrell v. Martin*, 17 Ill. App. 336.)

Neither can it omit the element of malice without fatal error. (*Greenwade v. Mills*, 31 Miss. 464.)

Mr. George T. Baggs, for Respondent.

A judicial record is always admissible to prove itself, and as the plaintiff's cause of action is based upon the commencement and termination of the prosecution against him in a court of justice, he must necessarily be both allowed and required to prove such commencement and termination by the best evidence. (*Olmstead v. Partridge*, 16 Gray, 381; *Winn v. Peckham*, 42 Wis. 493; *Mass v. Meire*, 37 Iowa, 97; *Ames v. Snider*, 69 Ill. 376; *Sweeney v. Perney*, 40 Kan. 102, 19 Pac. 328; *Cooper v. Utterbach*, 37 Md. 282.) There are a few decisions which declare that the discharge of the accused is not admissible as evidence of probable cause, and that the effect of such discharge is limited to proving that the prosecution has terminated;

but the majority of the decisions upon the subject affirm that the failure of the examining magistrate to commit or the grand jury to indict the accused is admissible, not merely as evidence that there was no sufficient proof to warrant indicting him or holding him to answer, but further, that the prosecutor did not have probable cause for his prosecution. This being true, then the whole record, and not a part thereof, was admissible for that purpose. (*Sharpe v. Johnston*, 76 Mo. 660; *Bornholdt v. Souillard*, 36 La. Ann. 103; *Bigelow v. Sickels*, 80 Wis. 98; *Frost v. Holland*, 75 Me. 108; *Vinal v. Core*, 18 W. Va. 42; *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Nicholson v. Coghill*, 9 Dowl. & R. 13; *Johnson v. Chambers*, 10 Ired. 287; *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85; *Cooper v. Utterbach*, 37 Md. 282.)

Though the plaintiff must be prepared to defend his general reputation, he is not required to meet charges of specific offenses. (*Gregory v. Thomas*, 2 Bibb, 286, 5 Am. Dec. 608.) The facts and circumstances upon which the defense relies as evidence of probable cause must tend to show the commission of the crime charged. It is not sufficient that they existed and tended to prove, or proved, a wrongful or criminal act, if it was not the act charged. Hence probable cause for the prosecution for larceny is not shown by evidence that the facts upon which the defendant proceeded tend to prove that the property had been converted. (*Turner v. O'Brien*, 5 Neb. 542; *Falvey v. Faxon*, 143 Mass. 284, 9 N. E. 621; *Stone v. Stevens*, 12 Conn. 219, 30 Am. Dec. 611.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for malicious prosecution. The plaintiff had verdict for \$550. Judgment was entered in his favor for this amount and costs of suit, taxed at \$102.60. The defendant has appealed from the judgment and an order denying him a new trial. He seeks a reversal of the judgment and order on the grounds: (1) That the evidence is insufficient to sustain the

verdict; (2) that errors of law occurred during the trial prejudicial to him; (3) that the damages awarded by the jury are excessive, being given under the influence of passion and prejudice; and (4) that the court abused its discretion in refusing a new trial on the ground of newly discovered evidence, which defendant could not with reasonable diligence have discovered or produced at the trial.

1. Appellant is not entitled to have the evidence examined to determine its sufficiency, for the reason that the bill of exceptions does not specify the particulars wherein the alleged insufficiency consists, as required by section 1152 of the Code of Civil Procedure. The rule has been uniformly observed by this court that, when the bill of exceptions or statement does not point out the particulars wherein there is a failure in the evidence to justify the verdict or decision, the appellant may not rely on any alleged insufficiency therein as a ground for a new trial. The bill of exceptions in this case was settled on January 31, 1905. The legislature of 1905 passed an Act approved March 4, 1905 (Laws 1905, p. 185, Chap. XCII), amending section 1152, *supra*, and section 1173 relating to statements on motion for new trial, so as to dispense with the necessity of specifications of particulars of insufficiency of the evidence; but it cannot be held to apply to bills of exceptions or statements settled prior to its enactment. Nevertheless we have examined the evidence with care, and do not think there is merit in appellant's contention. On most points it is conflicting, and, taken as a whole, presents a case upon which the jury was amply justified in finding for the plaintiff. It is not apparent, therefore, that the trial court abused its discretion in refusing a new trial on this ground.

2. The evidence shows that the defendant filed a complaint in one of the justices' courts in Ravalli county charging the plaintiff with the larceny of two hogs; that an examination was had by the justice, at which it was made to appear that there was a controversy between the plaintiff and the defendant as to whether they were tenants in common of the hogs, or whether

the plaintiff was merely the lessee of the defendant under a contract to care for the hogs for one-half the increase. The offense charged was grand larceny, and out of the prosecution thus instituted by the defendant, this action grew.

The justice was examined as a witness for the plaintiff, and, in connection with his statement, the record of the proceedings before him was introduced. He was requested to read the entries made by him upon his docket. This was done for the purpose of showing that the prosecution had terminated. All of the entries went in without objection. Among other things the docket shows the following: "After hearing the evidence in the above-entitled cause, the defendant found not guilty and discharged; and there seeming to be no grounds for complaint, judgment is hereby entered against George Corscadden, complaining witness, for costs." After this had been read to the jury, counsel for defendant objected to the part following the word "discharged," and moved to strike it out on the ground that it was immaterial. The objection and motion were overruled.

It is argued that this was gross error, in that the judgment of the justice upon the very point at issue, to-wit, whether the prosecution was without probable cause and malicious, was thus allowed to go to the jury as a prior adjudication of it. We think the evidence was wholly irrelevant and incompetent, as well as immaterial, whether offered as a prior adjudication of the issue on trial, or as an expression of opinion by the justice thereon. (*Farwell v. Laird*, 58 Kan. 402, 49 Pac. 518; *Apgar v. Woolston*, 43 N. J. L. 57; *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644; *Casey v. Sevaton*, 30 Minn. 516, 16 N. W. 407; *Fletcher v. Chicago etc. Ry. Co.*, 109 Mich. 363, 67 N. W. 330; *Bays v. Herring*, 51 Iowa, 286, 1 N. W. 558; *Anderson v. Keller*, 67 Ga. 58; *Skidmore v. Bricker*, 77 Ill. 164; *Israel v. Brooks*, 23 Ill. 526.) But, even so, the appellant cannot complain. The objection was not made until after the evidence had been admitted. It therefore came too late. Since this is so, the court committed no error in refusing to strike out the evidence. If

a party sits by and permits objectionable evidence to go into the record without protest, he may not afterward be heard to say that he has been prejudiced by the court's refusal to strike it out. (*Poindexter & Orr L. S. Co. v. Oregon Short Line Ry. Co.*, 33 Mont. 338, 83 Pac. 886.) If counsel did not know of the contents of the docket, he should have informed himself, and, having failed to do so and object at the proper time, the court was not bound to strike out the objectionable part of it.

During the cross-examination the justice was asked by counsel for defendant whether, when the warrant of arrest was issued and the plaintiff came into court, he had committed him to jail or required him to give bail for his appearance pending a hearing. He said that he had not, but had permitted him to go at large on his own promise to appear. Later, on re-examination, he was asked why he had not required bail. His answer was, in substance, that he did not require it of defendants if he had confidence in the person, and that he had confidence in plaintiff; besides, the plaintiff agreed to appear, and his father, who was with him, guaranteed his appearance. This statement was permitted to go to the jury over defendant's objection, and it is argued that it was incompetent as tending to establish a good reputation for the plaintiff in the community by thus indirectly introducing the mere personal opinion of the justice.

There was no issue in the evidence touching the reputation of the plaintiff in the community. The plaintiff did not put it in issue, nor was it attacked by the defendant. The matter was allowed to rest upon the presumption indulged by the law in favor of every person that he bears good repute among his neighbors until the contrary appears. The court was apparently of the opinion that, since it appeared that the justice had not followed the course contemplated by law in such cases, it was proper to permit him to explain why. As affecting the merits of the case, we think the reason why the justice indulged the plaintiff as he did was immaterial; but we cannot see that the mere use of the word "confidence" could have the effect upon the minds of the jury which counsel claim it must have had.

It amounts to no more than an expression of a personal belief, entertained at the time by the justice, that the plaintiff would appear at the hearing on the day fixed, without reference to any notion he might have had that the plaintiff had theretofore borne a good reputation. Under the circumstances, it was but natural for the inquiry to be made, and the answer was only such as the jury would naturally supply in their own minds, even though it had not been made and the matter called to their attention. It is hardly possible in any case to exclude all immaterial evidence, and when a particular fact is of such small significance as the one in question here, and was probably already inferred by the jury from the statements of the witness called out by the defendant himself, which were admittedly competent and material, it can hardly be said that it prejudiced the defendant.

As tending to show probable cause and absence of malice on the part of the defendant, counsel offered to prove by one Thomas that the plaintiff had confessed to him, about two years prior to his arrest, that he had at one time boarded at a restaurant in St. Louis, Missouri, and had made a habit of stealing articles of silverware from the restaurant and giving them to his relatives, all of which had been communicated to the defendant prior to the institution of the prosecution. Upon objection, this was excluded as irrelevant, and we think properly so.

All the books agree that the plaintiff must prove both want of probable cause and malice, and that, where the absence of the former is established, the presence of the latter may be inferred. In other words, when the proof tends to show the absence of the former, a *prima facie* case is made for the jury. The burden then rests upon the defendant to rebut this *prima facie* case; and this he must do by any evidence tending to show the existence of probable cause and the want of malice on his part. Probable cause, however, is not to be confounded with actual guilt. The latter must always be established by proof beyond a reasonable doubt, while "probable cause is only such a state of facts and circumstances as would lead a careful and

conscientious man to believe that the plaintiff was guilty." (*Barron v. Mason*, 31 Vt. 189.)

In the particular case, then, the inquiry must be, not whether the plaintiff was actually guilty, but whether the facts and circumstances were such as to warrant the defendant, as a prudent and conscientious man, to believe him guilty; and while mere reputation or the general report of plaintiff's guilt is not sufficient to establish probable cause, it is not necessary that the defendant should have seen and conversed with the witnesses themselves. This it is often impossible to do; just as in case of public officials whose sworn duty it is to prosecute violations of the law brought to their knowledge, though they cannot always see and converse with those who have actual knowledge. All that is required is that a prudent and conscientious inquiry be made, and if it then appears that testimony is at hand or obtainable justifying a well-founded belief that a violation of the law can be established and a conviction secured, there is probable cause to proceed with the prosecution; otherwise both the public officer and private citizen would be precluded from action to redress public wrongs, until witnesses had been seen and conversed with and a complete case made out.

The general reputation of the plaintiff at the time that the prosecution was instituted against him, becomes an important fact in the inquiry. For, naturally, the average prudent man would more readily impute guilt to a man of bad criminal reputation in the community, than to one of good character and standing. In this class of cases, therefore, evidence of the previous bad reputation of plaintiff is always admissible to rebut the proof of want of probable cause, as well as to mitigate the damages. (3 Sutherland on Damages, 708; Newell on Malicious Prosecution, 465; *Rosenkrans v. Barker*, 115 Ill. 331, 56 Am. Rep. 169, 3 N. E. 93; *Pullen v. Glidden*, 68 Me. 559; *McIntire v. Levering*, 148 Mass. 546, 12 Am. St. Rep. 594, 20 N. E. 191, 2 L. R. A. 517.) But, as Mr. Newell observes: "None of the cases go so far as to permit proof of particular instances of bad conduct." Reputation can be proven only by the testi-

mony of witnesses who, by association and acquaintance in the community where the person whose reputation is in question resides, know what is there said of him and who can, from such knowledge, express an opinion thereon. The testimony in question does not fall within this rule. It tends to show, not general reputation in the community, but specific acts of larceny not known in the community, so far as the offer to prove shows, except to the witness Thomas and the defendant.

But defendant contends that it also tended to show his good faith and, therefore, to rebut the allegation of malice. In this we think there is no merit; for, conceding that it might otherwise be admissible for this purpose, the offer to prove is too indefinite, in that it does not show when the confessed larcenies were committed, nor that the defendant believed the confession of them to be true. If he did not believe the hearsay report of them made to him, they would not in any case be the foundation of a belief of plaintiff's guilt of the larceny charged by himself. So far as the proof shows, the confession, though true, may have related to crimes committed many years ago, at a time too remote from the time of this controversy to have any evidentiary value as tending to show good faith in plaintiff.

3. Contention is made that the court erred in submitting several instructions to the jury. As an illustration: It is said that the third paragraph of the charge told the jury that the defendant must have relied exclusively, in good faith, upon the advice of counsel after a full and fair statement of all the facts within his knowledge, or else they must find against him. We do not so read this paragraph. In it the court told the jury, in substance, that if the defendant did not make a full, fair, and honest statement of all the facts in his knowledge to his counsel and act upon the advice given thereon, but did act upon a fixed determination of his own, then such advice could avail him nothing. We think this a correct statement of the law; for it seems clear that if he did not act upon the advice given him, but independently thereof, he may not rely upon

the fact that it was given him to show an honest belief that there was probable cause for the prosecution. In this part of the charge the court was dealing with the particular matter of the advice of counsel, and the extent to which the defendant might rely upon it to justify his conduct. It had already, in a preceding paragraph, told the jury that if the advice of counsel had been sought by him in good faith, upon a full and fair statement of the facts, and he acted upon it, this would be a complete defense.

In a later paragraph the jury were told that if the defendant honestly believed the plaintiff guilty, and acted upon such belief, and it was founded upon facts which would create a belief in a reasonable man that there was probability that the plaintiff had stolen the hogs in question, they must find for the defendant. Both of these instructions were as favorable to the defendant as he could demand; and, reading the whole charge together, we do not see how the jury could have understood that the defendant could not rely upon his own honest belief as well as the advice of counsel, or either.

Paragraph 25 of the charge is as follows: "In an action for malicious prosecution, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, not exceeding in all the amount claimed in the complaint." It is said of this instruction that it is not justified by the pleadings, for that there is no claim made therein for punitive damages. It is also argued that, since malice is an essential element to be established by the plaintiff in an action for malicious prosecution, this instruction, in effect, warranted the jury in finding for the plaintiff, without reference to whether the proof established the want of probable cause.

The Civil Code provides: "Sec. 4290. In any action for a breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may

give damages for the sake of example, and by way of punishing the defendant." The contention that, under this provision, the plaintiff must have claimed punitive damages *eo nomine* in the pleading or he could not recover them is without merit. The complaint alleges a tort, done with malicious motive. In every such case, says the statute, the jury may award punitive damages. All that is required in the pleading is to state a case which, if proved, will entitle the plaintiff to such damages, in addition to those actually sustained. (5 Ency. of Pl. & Pr. 724; *Savannah etc. Ry. Co. v. Holland*, 82 Ga. 257, 14 Am. St. Rep. 158, 10 S. E. 200; *Davis v. Seeley*, 91 Iowa, 583, 51 Am. St. Rep. 356, 60 N. W. 183; *Wilkinson v. Searcy*, 76 Ala. 176.)

Nor do we think the instruction excluded from the jury consideration of the element of the want of probable cause. The court had theretofore repeatedly and correctly told the jury that the plaintiff must establish both want of probable cause and malice, and that they must find both from the evidence, or that their verdict should be for the defendant. The effect of the instruction was to inform the jury that if they found these, they might, in fixing the actual damages, in consideration of the fact that malice was apparent, also add such amount as they thought the circumstances justified, by way of example. The statute includes actions for malicious prosecution, and since this action is founded upon malice, it must follow that punitive damages may, if the jury think proper and the court so instructs them, be awarded in every such case. Since the statute states the rule, the court did not err in following it. If counsel desired further specific instructions upon the subject, he should have requested them. Besides, it is reasonably apparent that the jury did not award punitive damages, for, since it found that the prosecution was malicious, it seems that the small verdict of \$550 would indicate that they were satisfied to award actual damages only.

4. This last remark disposes of the contention that the verdict is excessive. The amount awarded is, to say the least, a moder-

ate allowance for the humiliation and shame presumably suffered by the plaintiff by reason of a groundless charge of felony made against him, even though he was not committed to jail or required to give bail.

5. The newly discovered evidence upon which defendant based his application for a new trial consists in the statements of several persons residing in the neighborhood, to the effect that the plaintiff is of bad repute as a man of honesty, integrity, and veracity in the community. The defendant, in his affidavit, states that prior to the trial he made such inquiry as he could "as opportunity occurred," in order to find out the reputation of the plaintiff, but that he found the eight persons to whom he went, giving their names, reluctant to testify, and for that reason did not secure any witnesses whom he could use at the trial. He also had his attorney to make inquiry, and it appears that the attorney conversed with only one of these and one other in search of evidence. These two persons he found reluctant to testify. But after the trial was over he found plenty of witnesses who were ready and willing to furnish testimony, among them those furnishing their affidavits, and he says that if he could have a new trial, he could establish the bad repute which plaintiff bears.

The evidence relied on might, on another trial, produce a different result, though this is not apparent. Had the defendant made out a case of diligence, the district court might, upon the showing made, have granted a new trial; but he does not make out such a case. Inquiry of a few men in a populous community, "as opportunity occurred" does not show that defendant acted with that degree of diligence which the necessity of the case required; but that he became diligent only after he found the result of the trial adverse, and when smarting under a realization of defeat. It is apparent that if defendant had used the same diligence before the trial as he did afterward, he would have been successful in finding all the witnesses necessary, for we cannot assume that all the persons in the community who were competent witnesses and who must have

been acquainted with the plaintiff, were at first averse but are now willing to state the facts within their knowledge. This court has frequently approved the rule that an application for a new trial on this ground is addressed to the sound legal discretion of the trial court, and that its action upon the application will not be disturbed, except in instances manifesting a clear abuse of such discretion. (*In re Colbert's Estate*, 31 Mont. 477, 107 Am. St. Rep. 439, 78 Pac. 971.) Such abuse of discretion is not here apparent. And the rule is especially applicable in cases in which it is not apparent that if the new trial should be granted, the result would be different. (*Id*; *Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147.)

The defendant seems to have had a fair and impartial trial. We find no error in the record through which he has suffered prejudice. We think the judgment and order should be affirmed. It is so ordered.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

IN RE TERRETT.

(No. 2,316.)

(Submitted May 28, 1906. Decided July 2, 1906.)

*Criminal Law—Forgery—Bounty Certificates—Information—
Statutory Construction—Constitution—Habeas Corpus.*

Statutes—Constitutionality—Title—Penalty Clause.

1. A penalty clause may be incorporated in an Act without being designated in its title, and such provision is not in violation of the constitutional inhibition (Constitution, Art. V, sec. 23) that no bill containing more than one subject shall become a law, which subject shall be clearly expressed in the title of the bill.

Statutory Construction—Legislative Intent.

2. In construing a section or sections of a statute, the intention of the legislature is to be gathered from the entire Act, irrespective of its division into sections, made for convenience only.

34	325
p34	436
34	442
34	325
35	525
436	200
34	325
d40	433

Bounty Certificates—Forgery—Statutes—Title—Penalty Clause.

3. *Held*, that sections 3078 and 3079 of the Political Code, providing in substance, respectively, that a person falsely making, altering, forging or counterfeiting a bounty certificate shall be guilty of forgery, and that one doing certain acts with relation to such certificates with intent to defraud the state, shall be guilty of a misdemeanor, each section providing penalties, together constitute the penalty clause of the Act entitled "An Act to Provide a Bounty on Certain Stock Destroying Animals and a Fund for the Payment Thereof" (Pol. Code, secs. 3070-3080), and that, since a penalty clause may be incorporated in an Act without being designated in its title, the legislation is not invalid because the provisions of section 3078 were not particularly set out in the title of the statute.

Same—Statutes—Validity—Title—Constitution.

4. Act of March 6, 1903 (Laws 1903, p. 166), amendatory of sections 3070-3073 of the Political Code relative to bounties on certain stock-destroying animals, and which sought to amend section 1124 of the Penal Code, also referring to bounties, but theretofore repealed (Laws 1897, p. 249), while of no effect as to the attempted amendment of repealed section 1124, is valid and not unconstitutional, for the alleged reason that its title contains more than one subject.

Same—Statutes—Validity—Title.

5. The Act of March 6, 1903 (Laws 1903, p. 166), amending sections 3070-3073 of the Political Code relative to bounties on wild animals, and providing for bounty inspectors to examine the hides and issue the certificates, whereas in the former Act the county clerk was the officer to do so, is not invalid, in that it provides an entirely new set of officers to administer the law and therefore is broader than the original Act and broader than its own title—since the provisions of the amendatory Act are germane to the subject treated in the original Act, and under its title any provision could be inserted relative to officers to carry out its provisions which might have been incorporated in the original Act under its title.

Same—Forgery—Statutes—Who may not Raise Questions of Validity.

6. A person appointed to act as bounty inspector under the provisions of Act of March 6, 1903 (Laws 1903, p. 166), and who, while acting as such, was charged with forgery of bounty certificates, he having thus been at least a *de facto* officer, will not be heard to raise the question of the invalidity of the Act on the ground that it imposes duties upon district judges, in the selection of three representative stockgrowers to appoint bounty inspectors, not judicial in character.

Bounty Inspectors—Appointment—Constitution—District Judges.

7. Since bounty inspectors, provision for whose appointment is made in Act of March 6, 1903 (Laws 1903, p. 166), are not officers whose appointment is "otherwise provided for" in the Constitution (Const., Art. VII, sec. 7), the legislature had the power to delegate the selection of three stockgrowers in each county to appoint bounty inspectors to the district judges.

Forgery—Bounty Certificates—Information—Sufficiency.

8. An information which charged that accused feloniously did falsely make, forge and counterfeit a bounty certificate in that, while acting as bounty inspector under Act of 1903 (Laws 1903, p. 166), he made and delivered to a bounty claimant a certificate setting forth that such claimant had exhibited the skins of certain wild animals to him (defendant), had filed the necessary affidavits, and that defendant, as such inspector, had examined and marked the skins as required by law, whereas these precedent conditions to the issuance of the certificate had not been fulfilled, the defendant knowing that the state-

ments so made were false, states a public offense under Political Code, section 3078, which provides that any person who shall falsely make, forge, etc., a bounty certificate shall be guilty of forgery.

Same—Bounty Certificates—Statutes—Information.

9. The offense of forgery charged, under Political Code, section 3078, to have been committed by a bounty inspector in falsely making a bounty certificate, is not committed by making the false statements of fact in the certificate, but by making the certificate when certain conditions precedent to its issuance, with the fulfillment of which he is charged (Laws 1903, p. 166), have not been performed, and does not, therefore, necessarily fall within Penal Code, section 294, which declares that any public officer who makes a certificate containing statements which he knows to be false is guilty of a misdemeanor.

Same—Bounty Certificates—Information—Sufficiency.

10. The crime of forgery charged against a bounty inspector under Political Code, section 3078, is purely statutory, and it is, therefore, not necessary to allege in the information extrinsic facts to show wherein or whereby the certificate charged to have been falsely made might apparently be of legal efficacy or the foundation of a legal liability.

(MR. JUSTICE MILBURN dissenting.)

ORIGINAL application by L. R. Terrett for a writ of *habeas corpus*. Denied.

Mr. Sydney Sanner, Mr. Geo. W. Farr, Mr. Fred. H. Hathhorn, and Mr. F. V. H. Collins, for Relator.

We contend that section 3078 of the Political Code is unconstitutional, for the reason that the Act of February 26, 1895, of which it forms a part, did not include the subject matter of said section within the title of the Act. It contains more than one subject, to-wit, a provision for a bounty and the penalty clause, and a definition of and provision for the offense of perjury, and a definition of and provision for the offense of forgery. The following authorities disclose that such a condition cannot be permitted under our Constitution: *Montclair v. Ramsdell* (1882), 107 U. S. 147-155, 2 Sup. Ct. 391, 27 L. Ed. 431; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100, and cases; *Jobb v. Meagher Co.*, 20 Mont. 424, 51 Pac. 1034, and cases; *State v. Anaconda C. M. Co.*, 23 Mont. 498, 59 Pac. 854, and cases; *State v. Courtenay*, 27 Mont. 378, 71 Pac. 308, and cases; *Western Ranches v. Custer Co.*, 28 Mont. 278, 72 Pac. 659, and cases;

Sutherland on Statutory Construction, secs. 88 and 102; *State v. Brown*, 29 Mont. 179, 74 Pac. 366; Cooley's Constitutional Limitations, p. 212; *In re Breen*, 14 Colo. 401, 24 Pac. 3; *In re Snyder*, 108 Mich. 48, 65 N. W. 562; *In re Hauck*, 70 Mich. 396, 38 N. W. 269; *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 381, 55 Am. Rep. 693, 25 N. W. 372; *People v. Beadle*, 60 Mich. 22, 26 N. W. 800; *In re Wood*, 34 Kan. 645, 9 Pac. 758; *Ex parte Thomason*, 16 Neb. 238, 20 N. W. 312; *Dempsey v. State*, 94 Ga. 766, 22 S. E. 57; *Hatfield v. Commonwealth*, 120 Pa. St. 395, 403, 14 Atl. 151; *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596; *Mayor v. Lewis*, 12 Lea, 180; *State v. Fields*, 68 S. E. 148, 46 S. E. 771; *State v. Tieman*, 32 Wash. 294, 98 Am. St. Rep. 854, 73 Pac. 375; *Walker v. State*, 49 Ala. 329; *Lacy v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, 24 S. E. 930, 31 L. R. A. 822; *Fidelity etc. Co. v. Shenandoah etc. R. R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759; *State v. Momland*, 3 N. Dak. 427, 44 Am. St. Rep. 572, 57 N. W. 85; *People v. Gadway*, 61 Mich. 285, 1 Am. St. Rep. 578, 28 N. W. 101; *Harris v. State*, 110 Ga. 887, 36 S. E. 232; *Burns v. State*, 104 Ga. 544, 30 S. E. 815; *Sasser v. State*, 99 Ga. 54, 25 S. E. 619; *Hayes v. Storms*, 64 N. J. L. 415, 45 Atl. 809; *State ex rel. Henry v. MacDonald*, 25 Wash. 122, 64 Pac. 912; *Clark v. Board of Commissioners*, 54 Kan. 634, 39 Pac. 225; *State v. Silver*, 9 Nev. 227; *Van Houton v. People*, 22 Colo. 55, 43 Pac. 137; *Ryno v. State*, 58 N. J. L. 238, 33 Atl. 219; *Ex parte Gayles*, 108 Ala. 514, 19 South. 12; *State v. Halbert*, 14 Wash. 305, 44 Pac. 538; *Commonwealth v. Hardsell*, 5 Pa. Dist. Ct. Rep. 148; *Commonwealth v. Moore*, 4 Pa. Dist. Ct. Rep. 649; *Commonwealth v. Lehr*, 16 Pa. Co. Ct. 532; *Commonwealth v. Darlington*, 8 Pa. Dist. Ct. Rep. 237; *Winkler v. Commonwealth*, 7 Pa. Dist. Ct. Rep. 696; *State v. Walker*, 105 La. 492, 29 South. 973; *Commonwealth v. Hodusko*, 10 Pa. Dist. Ct. Rep. 230; *State v. Davis*, 130 Ala. 148, 89 Am. St. Rep. 23, 30 South. 344.

The Act of March 6, 1903, is unconstitutional and void, because its title expresses more than one subject, and because there are subjects in the body of the Act that are not expressed in the

title. (*Preston v. Stover* (Neb.), 97 N. W. 812; *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 991.)

The imposition of the duty upon the district judge to appoint three representative stockgrowers in each county to appoint bounty inspectors, by section 4 of the Act of 1903 (Laws 1903, p. 166), is a clear intermingling of the departments of government, contrary to the Constitution, and a clear invasion of the integrity of the judicial department as established by the Constitution. (Const., Art. IV, sec. 1, Art. III, sec. 29; *In re Weston*, 28 Mont. 219, 72 Pac. 512; *Schwartz v. Dover*, 68 N. J. L. 576, 53 Atl. 214; *Beasley v. Ridout*, 94 Md. 641, 52 Atl. 61; *Phelan v. San Francisco*, 20 Cal. 40; *Burgoyne v. San Francisco*, 5 Cal. 9; *Houseman v. Kent*, Circuit Judge, 58 Mich. 364, 25 N. W. 369; *Foreman v. Hennepin County*, 64 Minn. 371, 67 N. W. 207; *Van Slyke v. Insurance Co.*, 39 Wis. 390, 20 Am. Rep. 50; *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143, 4 L. R. A. 101, 21 N. E. 244; *In re Supervisors of Election*, 114 Mass. 247, 19 Am. Rep. 341; *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174, 22 South. 721; *Lewis' Sutherland on Statutory Construction*, 2d ed., sec. 4; *Heinlen v. Sullivan*, 64 Cal. 378, 1 Pac. 158.)

The information charges forgery, and charges that the forgery consisted of certain things which are assertions of falsehoods in the certificate issued by the petitioner. It is admitted that all the signatures are genuine; that the petitioner uttered the certificate; that he was bounty inspector at the time, and that his crime consisted in the statement of matters in said certificate which are not true. This, we submit, cannot be forgery under any provisions of law known to our Code. The making of a false instrument is not forgery. So a man may utter an instrument purporting to be done by authority, it matters not whether such authority be personal or official; when he has no authority, he may be guilty of a breach of trust, but he cannot commit forgery so long as the instrument is over his own hand and is what it purports to be, to-wit, his instrument. (*Mann v. People*, 15 Hun, 155, 75 N. Y. 484, 31 Am.

Rep. 482; *State v. Young*, 46 N. H. 266, 88 Am. Dec. 212; *People v. Bendit*, 111 Cal. 274, 52 Am. St. Rep. 186, 43 Pac. 901, 31 L. R. A. 831; *United States v. Wentworth*, 11 Fed. 52; *State v. Willson*, 28 Minn. 52, 9 N. W. 28; *State v. Corfield*, 46 Kan. 207, 26 Pac. 499; *People v. Cole*, 130 Cal. 13, 62 Pac. 274; *United States v. Glasener*, 81 Fed. 566; *United States v. Moore*, 60 Fed. 738; *Commonwealth v. Baldwin*, 77 Mass. 197, 71 Am. Dec. 703; *State v. Taylor*, 46 La. Ann. 1332, 49 Am. St. Rep. 351, 16 South. 190, 25 L. R. A. 591; *United States v. Cameron*, 3 Dak. 132, 13 N. W. 561; *Commonwealth v. Foster*, 114 Mass. 311, 19 Am. Rep. 353; *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 208; *People v. Underhill*, 142 N. Y. 38, 36 N. E. 1049; *State v. Phelps*, 11 Vt. 116, 34 Am. Dec. 672; note to *Arnold v. Cost*, 22 Am. Dec. 307; note to *Hendricks v. State*, 8 Am. St. Rep. 469; *Regina v. White*, 2 Car. & P. 404; *People v. Fitch*, 1 Wend. 198, 19 Am. Dec. 477; *Rex v. Story*, Russ. & R. 81; *Rex v. Arscott*, 6 Car. & P. 408; *Regina v. Martin*, 49 L. R. C. C. R. 214; *Dunn's Case*, 1 Leach C. C. 57.)

Even if the Acts above discussed are constitutional, and if the deeds of the petitioner are forgeries as claimed by the state, the information is not sufficient in this: that it does not show how, or in what way, the papers set out in the information are or could be the basis of any liability, or the evidence of anybody's right under the law. (*Territory v. De Lana*, 3 Okla. 573, 41 Pac. 618; *State v. Evans*, 15 Mont. 539, 48 Am. St. Rep. 701, 39 Pac. 850, 28 L. R. A. 127; *Underhill on Evidence*, sec. 430.)

Mr. Albert J. Galen, Attorney General, *Mr. E. M. Hall*, Assistant Attorney General, and *Mr. John C. Lyndes*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 24, 1905, an information was filed in the district court of Rosebud county charging the petitioner, L. R. Terrett,

with the crime of forgery. The petitioner was arrested and confined in the county jail. He thereupon made application to the chief justice of this court for a writ of *habeas corpus*, which writ was issued, and upon the return the matter was argued and submitted to the court.

Two questions only need to be considered: 1. Are the statutes under which the prosecution is conducted valid? 2. Does the information state facts sufficient to constitute a public offense?

1. The particular legislative Acts in question are an Act entitled "An Act to provide a Bounty on certain Stock Destroying Animals and a Fund for the Payment thereof," approved February 26, 1895. The several sections of this Act are printed in the Political Code as sections 3070 to 3080; and an Act of the Eighth Legislative Assembly, entitled "An Act to amend section 1124 of the Penal Code of the State of Montana, and sections 3070, 3071, 3072 and 3073 of the Political Code of the State of Montana relating to Bounties of Wild Animals," approved March 6, 1903. (Session Laws, 1903, p. 166.)

Objection is made to the Act of February 26, 1895, which embraces what is now section 3078 of the Political Code. It is contended that the Act comprehends subjects not expressed in the title of the Act, contrary to the provisions of section 23, Article V, of the Constitution. It must be conceded that a penalty clause may be incorporated in an Act without being designated in the title of the Act, and such provision does not violate the constitutional inhibition. This has been set at rest in this state by the decisions of this court. (*State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *Snook v. Clark*, 20 Mont. 230, 50 Pac. 718.)

But it is contended that section 3079 of the Political Code, which was section 10 of the Act of February 26, 1895, above, is in fact the penalty clause of that Act, and that the provisions of section 3078, above, cannot be included in such designation. But the mere division of a legislative Act into sections is a matter of convenience only, and the intention of the legislature is to be gathered from the entire Act, irrespective of such divi-

sion. Sections 3078 and 3079 are clearly intended as the penalty clause of that enactment. Their provisions are clearly intended to cover the various phases of crimes which might be committed with respect to the subject matter of the Act.

It is further claimed that the Act of March 6, 1903, is unconstitutional in that its title contains more than one subject. It will be observed that it seeks to amend section 1124 of the Penal Code, and sections 3070, 3071, 3072 and 3073 of the Political Code. But section 1124 of the Penal Code was repealed by an Act of the Fifth Legislative Assembly, approved March 8, 1897 (Laws 1897, p. 249), so that the attempt made in 1903 to amend a section already repealed was ineffectual, and to that extent the Act of 1903, above, is inoperative. But this does not affect the Act in so far as it relates to certain sections of the Political Code.

It is further contended that the Act of March 6, 1903, is invalid, because the scope of the Act is broader than the Act of February 26, 1895, which it sought to amend, and broader than its own title. This contention is based upon the fact that the Act of 1903 provides for an entirely new set of officers to administer the law—to examine the hides and issue the bounty certificates. The Act of February 26, 1895, designated the county clerk as the officer who should issue the certificate, and that officer and the county treasurer, or in his absence the district clerk, as the officers to examine the skins. The Act of 1903 merely substituted for these officers others, designated "bounty inspectors." The provisions of the amendatory Act are germane to the subject treated in the original Act and under the title of the amendatory Act any alteration by excision, addition or subtraction might have been made, and any provision inserted which might have been incorporated in the original Act under its title. (1 Lewis' Sutherland on Statutory Construction, sec. 137.) The Act of 1903 dealt generally with the subject of bounties on stock destroying animals, and under the title of that Act provision was properly made for officers to carry out its provisions. This is clear upon principle and is

generally recognized by the authorities. (See extensive note to *Crookston v. County Commissioners*, 79 Am. St. Rep. 453 (s. c., 79 Minn. 283, 82 N. W. 586), and *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095.)

It is also said that the Act of 1903 imposes upon the district judges the duty of appointing persons to select the bounty inspectors, and in so doing imposes duties not judicial in character. But this question cannot be raised by the petitioner here. Whether in a proper case a district judge could be compelled to perform this duty need not be considered. Terrett was at least a *de facto* officer, and in this proceeding he will be treated as such. The same thing may be said of the three persons who appointed the bounty inspectors. However, under section 7, Article VII, of the Constitution, the power to appoint or delegate the appointing power is reserved to the people, acting through the legislature, in every instance, except in those enumerated in the Constitution. The appointment of these persons to select bounty inspectors could properly be delegated by the legislature, as they are not officers whose appointment is otherwise provided for in the Constitution itself.

Certain sections of the bounty law as found in the Political Code were amended by an Act of the Sixth Legislative Assembly, approved February 27, 1899. (Session Laws, 1899, p. 100.) In the Act of March 6, 1903, above, which also sought to amend some of the same sections, the amendments made in 1899 are ignored. However, this does not affect the questions presented in this instance.

2. Does the information state a public offense? Stripped of the merely legal and technical verbiage, the information charges, substantially, that Terrett, while acting as a bounty inspector in Rosebud county, made and delivered to one Sam Shaver a bounty certificate for 43 coyote, and 11 wolf skins, and in the certificate certified that on October 15, 1903, Shaver exhibited such skins to him and filed the necessary affidavits, and that he (Terrett) as such inspector examined and marked the skins as required by law; whereas, in truth and in fact, Shaver did not

exhibit such skins, or any of them, to Terrett, and did not make the necessary affidavits, or any affidavit; nor did Terrett examine or mark the skins, or any of them, and the statements in the certificate so falsely made were known by Terrett to be false. Do these facts, then, when set forth in an information in which it is charged that Terrett feloniously did falsely make, forge and counterfeit said certificate, state a public offense?

Section 3078 of the Political Code, above, provides that any person who shall falsely make, alter, forge or counterfeit a certificate, such as the one mentioned in this information, is guilty of forgery. It is urged with much force and with abundance of authorities that there is a very marked difference between falsely making a certificate and making a false certificate; and, as an abstract proposition, we agree with this, although there are authorities to the contrary. The telling of a lie does not necessarily constitute forgery, merely because the lie is reduced to writing. But we are of the opinion that this matter is to be determined upon a principle to which little, if any, attention was given on oral argument.

It is to be observed that Terrett is charged with having made this certificate while acting as a bounty inspector. In other words, he was merely the agent of the state, with limited authority. He could make this certificate only after the performance of certain precedent conditions, viz., the exhibition to him of the hides, the examination and marking of them by him, and the filing with him of the necessary affidavits. A certificate made without these precedent conditions having been fulfilled is falsely made. It purports to be, what it is not, a certificate duly issued according to law. This is the view taken by certain courts of this country in cases to all intents and purposes identical with the one at bar. (*Ex parte Hibbs*, 26 Fed. 421; *United States v. Hartman*, 65 Fed. 490; *Luttrell v. State*, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886; *Commonwealth v. Wilson*, 89 Ky. 157, 25 Am. St. Rep. 528, 12 S. W. 264; *Moore v. Commonwealth*, 92 Ky. 630, 18 S. W. 833. See, also, *Biles v. Commonwealth*, 32 Pa. St. 529, 75 Am. Dec. 568.)

Numerous cases are cited by counsel for petitioner, apparently holding a view contrary to the one here announced. Some of them are directly in point and illustrate the conflict in the authorities. Others are upon statutes so different from our own as to be of no weight as precedents in this case; while in most, if not all, of them the particular principle relied upon in the cases cited above, and which we deem conclusive here, apparently was not considered.

The crime is not committed by making the false statements of fact in the certificate, and therefore this offense does not necessarily fall within section 294 of the Penal Code, but by making the certificate when the precedent conditions had not been fulfilled. The offense charged is purely statutory. It is not, therefore, necessary to allege in the information extrinsic facts to show wherein or whereby this certificate might apparently be of legal efficacy or the foundation of a legal liability. To falsely make one of these certificates is declared to be forgery.

We are of the opinion that the statutes under which this prosecution is being conducted are valid, and that the information states a public offense.

The writ of *habeas corpus* heretofore issued is quashed, and the petitioner remanded to the custody of the sheriff of Rosebud county.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN: I dissent as to the matter of forgery. I think that, as said in the language of Mr. Justice Holloway in the majority opinion, one argues "with abundance of authorities that there is a marked difference between falsely making a certificate and making a false certificate." The certificate alleged as all made by Terrett as inspector may upon the trial be shown to be entirely false in its statements; but, while one may call it a "genuine lie," I do not believe it to be a forged document.

Rehearing denied October 22, 1906.

34	336
137	30

34	336
40	609

IN RE DOUGHERTY'S ESTATE. DOUGHERTY, APPEL-
LANT, v. DOUGHERTY ET AL., RESPONDENTS.

(No. 2,276.)

(Submitted June 7, 1906. Decided July 2, 1906.)

*Probate Proceedings—Administrators—Accounts—Settlement
—Objections—Allowance to Widow—Appealable Orders—
Record—Bills of Exceptions—Estoppel.*

Administrators—Accounts—Allowance to Widow—Modification—Appeal.

1. An administratrix whose account was so modified by an order of the district court as to strike out a portion of her allowance as widow of her intestate could not appeal from such order in her representative capacity, since as administratrix she was not aggrieved, the order only affecting her in her individual right.

Bills of Exceptions—Their Purpose.

2. The purpose of a bill of exceptions is to incorporate in authentic form, as a part of the record, proceedings on the trial, including rulings of the trial judge alleged to be erroneous, the objections and exceptions taken thereto, with the grounds thereof, which would not otherwise appear in the record.

Appeals—Orders—Record—Bills of Exceptions.

3. On appeals from orders other than those granting or refusing new trials, the papers used on the hearing in the trial court must be made a part of the record by a bill of exceptions, settled in the usual way, and if not so incorporated, they are not properly a part of the record and cannot be considered on appeal.

Probate Proceedings—Appeals—Record.

4. In the absence of specific provisions, in the Code of Civil Procedure, relating to new trials and appeals in probate proceedings as to the contents of the record in such cases, or the mode of authenticating it, the provisions regulating bills of exceptions, statements and appeals in ordinary actions are applicable and, so far as may be, the analogies between them must govern.

Same—Appeals—Judgment-roll—Record.

5. While, technically, there is no judgment-roll in probate proceedings, the successive determinations of the court in the course of them, whenever directly or by implication declared by the statute to be final, must be regarded as final judgments, and the portions of the record upon which they are based must, on appeal, be regarded as the record for the particular determination.

Same—Administrators—Accounts—Settlement—Appeal—Record.

6. On appeal from an order of the district court settling the account of an administratrix, the account, the written objections thereto, and the findings, and order of the court, together with a certified copy of the notice of appeal, held to be the judgment-roll for the purpose of the appeal, and a sufficient record to entitle the appeal to consideration on its merits.

Same—Appeal—Record.

7. *Obiter*: Matters not forming part of the judgment-roll in a probate proceeding should be incorporated in a bill of exceptions or statement on motion for new trial, as the case may be, for purpose of appeal.

Same—Allowance to Widow—Notice.

8. The widow of an intestate being entitled to an allowance during the progress of settlement of the estate of decedent as a matter of right (Code Civ. Proc., secs. 2580, 2582), notice of the court's intention to make such allowance is not required.

Same—Allowance to Widow—Application—Necessity.

9. *Semble*: A widow being entitled to an allowance as a matter of right, pending the settlement of the estate of her deceased husband, it would seem that a formal application therefor is not required.

Same—Allowance to Widow—Appealable Orders.

10. An order granting an allowance to a widow out of the estate of her intestate is appealable, under Code of Civil Procedure, section 1722, as amended by Act of 1899 (Laws 1899, p. 146), and where an appeal therefrom is not taken within sixty days, it becomes final and conclusive and may not thereafter be attacked collaterally.

Same—Allowance to Widow—Modification—Mode.

11. *Obiter*: If an order making an allowance to a widow may be modified from time to time, in order to meet the changed conditions of the estate or the varying necessities of the widow, or the widow and children, a direct motion to that effect must be made, and mere objections to the account of the administratrix are not sufficient to move the discretion of the court in the matter.

Same—Allowance to Widow—For What Period.

12. Under Code of Civil Procedure, section 2582, declaring that, if an estate is not insolvent, the allowance made to the widow may continue "during the progress of the settlement of the estate," the widow can claim such an allowance only for such length of time as is reasonably necessary to settle the estate.

Same—Allowance to Widow—For What Period.

13. An estate, the appraised value of which did not exceed \$5,000, was ready for distribution February 6, 1904, at which time all claims against the estate had been paid, including an allowance to the widow amounting to \$2,085.51. The allowance claimed by the widow up to that date amounted to \$3,124.90 and on March 21, 1905, to \$4,829.80. *Held*, that the court was justified in refusing to ratify any allowance after the estate was ready for distribution.

Same—Allowance to Widow—Objections—Estoppel.

14. The indulgence of persons interested in the estate of an intestate, in not compelling an administratrix to make final settlement and distribution after the expiration of a reasonable length of time in which to wind up the affairs of the estate, did not estop them to object to an allowance, claimed by her in her individual capacity as widow of her intestate, after the date when settlement should have been made.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

PROCEEDINGS in the estate of Anthony Dougherty, deceased. From an order settling the accounts of Annie Dougherty, administratrix, to the allowance of which certain of the next of kin of the deceased who are entitled to share in the estate made various objections, and striking out certain credits on account of an allowance theretofore made to her, she appeals both as administratrix and in her individual capacity. Modified and affirmed.

Mr. E. B. Hoffman, Mr. T. J. Walsh, and Mr. Lincoln Working, for Appellant.

Mr. John B. Clayberg, Mr. M. S. Gunn, and Mr. C. A. Spaulding, for Respondents.

Mr. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

These appeals are from an order of the district court of Lewis and Clark county settling and allowing an account of Annie Dougherty, administratrix of the estate of Anthony Dougherty, deceased. The death of the decedent occurred some time prior to January 7, 1902. On that date the court regularly made and entered an order allowing Annie Dougherty, the widow, \$125 per month for her maintenance during the progress of administration. The estate consisted of real and personal property. On February 14th of that year, a homestead was set apart for her. On February 6, 1904, the administratrix filed her exhibit and account. Upon a hearing thereon the account was settled without objection from anyone. It appeared therefrom that there had come into the hands of the administratrix \$2,599.18 in cash; that all claims against the estate had been paid; that a balance of \$2,085.61, remaining in her hands after the payment of claims, had been retained by her in payment of her allowance, and that there was then due her an unpaid balance on that account of \$1,039.29. On March 22, 1905, she filed another account. From this it appeared, among other things, that the amount found in February, 1904,

to be due her on her allowance had not been paid, and that there was then due her in this behalf a balance of \$2,754.19. The property then remaining in her hands consisted of real estate, yielding a small income, of an appraised value of \$2,290. To the allowance of this account various objections were interposed by certain of the next of kin of the deceased who are entitled to share in the estate.

The principal matter in controversy was the validity of the order making the family allowance. It was objected that the order was void because it was made without notice, and hence that the administratrix was not entitled to credit for the amount retained by her for her allowance, nor for the amount due and unpaid as appeared from the account of February 6, 1904, nor for any amount subsequent to that date. It was also further objected that, though the order be conceded to be valid, yet it was apparent from the record of the proceedings and the condition of the estate, that the administratrix should have closed up the administration within one year from the date of her appointment, whereas, she had purposely delayed closing it up in order that she might consume the whole of the estate for the payment of her allowance, and thus exclude the next of kin from any share therein. For this reason it was argued that she should be charged with all amounts in excess of \$1,500, retained in payment of her allowance or still claimed to be due during the one year.

The court struck out all credits on account of the allowance, except the item of \$2,085.61, which appeared from the account of February 6, 1904, to have been already paid; ordered that no further allowance be made, and directed the administratrix to make final settlement at once. Thereupon Annie Dougherty appealed, both as administratrix, and in her own right as widow. It is alleged that the court erred in striking out the item of \$1,039.29 found to be due in the account of February, 1904, and disallowing further credit in that behalf after that date.

1. It is apparent that appellant in her capacity as administratrix was not aggrieved by the order. It is a matter of no

moment to her what disposition is made of the property, so long as it is preserved for the estate, and reaches the hands of those who are entitled to it. It is only in her individual right that she may be heard to complain, for the order affects her only in this respect. Her appeal in her representative capacity is therefore dismissed.

2. The record before us consists of the account, the written objections thereto, and the findings and order, certified by the clerk as the judgment-roll, with a certified copy of the notice of appeal. The contention is made by the respondents that the order is not a final judgment, and hence that the proper record on appeal therefrom is not a judgment-roll, because there can be no such thing in probate proceedings, but an exemplification of all the papers used on the hearing in the court below in the form of a bill of exceptions; and since the record of the case is not before us in this form, the appeal may not be considered on its merits.

In *Re Estate of Tuohy*, 23 Mont. 305, 58 Pac. 722, and in *Re Kelly's Estate*, 31 Mont. 356, 78 Pac. 579, 79 Pac. 244, this court held that statutory determinations in probate proceedings termed "orders or judgments," are not final judgments so that appeals will lie from them as such under the provisions of the Code (section 1722, subd. 1, amended by Session Laws, 1899, p. 146). In these cases the court considered only the question of the appealable character of such orders, and concluded that appeals from them are authorized, if at all, under subdivision 3 of the section mentioned. Nothing is said in either of them, directly or indirectly, touching the form or contents of the record required to present appeals in this court.

The purpose of a bill of exceptions is to incorporate in authentic form, as a part of the record, proceedings on the trial, including rulings of the trial judge alleged to be erroneous, the objections and exceptions taken thereto, with the grounds thereof, which would not otherwise appear therein. Otherwise the record proper consists only of the pleadings, process, the instructions given and refused, the verdict or the findings, and

judgment. If defendant has appeared in the case the process may be omitted. Section 1737 of the Code of Civil Procedure provides: "On appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of *papers* used on the hearing in the court below."

The question how the record shall be authenticated on appeals from orders other than orders granting or refusing new trials, was directly considered and settled in *Cornish v. Floyd-Jones*, 26 Mont. 153, 66 Pac. 838, *Rumney Land etc. Co. v. Detroit & Mont. C. Co.*, 19 Mont. 557, 49 Pac. 395, and *Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121. The result of these cases is the rule that the papers used on the hearing in the trial court must be made a part of the record by a bill of exceptions, settled in the usual way, else they are not properly in the record, and cannot be considered. Of course, the record on appeals from orders granting or refusing new trials is made up under other provisions (Code Civ. Proc., secs. 1736, 1738), and what is here said has no reference to them.

Section 2921 of the Code of Civil Procedure, relating to new trials and appeals in probate proceedings, provides: "The provisions of Part II of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this Title, apply to the proceedings mentioned in this Title." Since we find no specific provision in this Part of the Code as to the contents of the record in such cases, or the mode of authenticating it, the provisions regulating bills of exceptions, statements and appeals in ordinary actions must be applied, and so far as may be, though the proceedings are conducted in a different way and the records differ in their makeup, the analogies between them must govern.

While there is no such thing, technically, as a judgment-roll in probate proceedings, the successive determinations in the course of them, whenever the statute directly or by implication declares them final, must be regarded as final judgments, and

the portions of the record upon which they are based must on appeal be regarded as the record for the particular determination. It would be idle to require that they should be authenticated by bills of exceptions in order to make them a part of the record, since they are already such. It must follow, then, that the rule announced in *Emerson v. McNair* and the other cases cited *supra*, can have no application.

From this point of view, considering the character of determination now before us, the record must be held to consist of the papers which we find in the transcript; and for the purpose of this appeal, these papers must be held to constitute the judgment-roll. Other matters, not forming part of the judgment-roll in such cases, would have to be incorporated in bills of exception or statements, as the case might be, following the analogies of provisions regulating records on appeals from judgments in ordinary actions. We find this to be the rule in California under identical provisions. In view of what has already been said, we think it founded upon a correct principle. (*Estate of Page*, 57 Cal. 238; *Estate of Isaacs*, 30 Cal. 106; *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639; *In re Ryer's Estate*, 110 Cal. 556, 42 Pac. 1082.) In the last case the court said: "There is no 'judgment-roll,' strictly speaking, in proceedings in probate, but whenever proceedings in probate are so akin to a civil action as to necessitate the 'papers' which are declared by section 670 (Code Civ. Proc.) to constitute the judgment-roll in a civil action, they may be held to constitute the judgment-roll referred to in section 661 (Code Civ. Proc.)." Sections 661 and 670 of the California Code of Civil Procedure are substantially the same, so far as they apply to the matter here involved, as sections 1176 and 1196 of our Code; and section 1714 of the Code of the former state is identical with section 2921 of our Code, *supra*. So section 950 of the California Code, declaring what the record on appeal from a final judgment shall be, is identical with 1736 of our Code on the same subject. The record in this case is sufficient, and the appellant is entitled to have the order reviewed on its merits.

3. The contention that the order of January 7, 1902, is void because made without notice, cannot be sustained. Under the provisions of the statute governing the subject (Code Civ. Proc., secs. 2580, 2582), the widow is entitled to an allowance as a matter of right, on grounds of public policy (Woerner on American Law of Administration, sec. 77); and no notice of the court's intention or action in the matter is required. Nor, it seems, is a formal application required. (*Leach v. Pierce*, 93 Cal. 624, 29 Pac. 238; *Estate of Bell*, 131 Cal. 1, 63 Pac. 81, 668.) These two sections and section 2581 go hand in hand, and when an order is made in pursuance of them, all the findings of fact necessary to support it will be presumed.

The order here involved is an appealable one (subdivision 3, section 1722, Code Civ. Proc., amended by Session Laws, 1899, p. 146), and, unless an appeal be taken therefrom within sixty days, it becomes final and conclusive, and cannot, thereafter, be attacked collaterally. (*In re Nolan's Estate*, 145 Cal. 559, 79 Pac. 428; *In re Stevens' Estate*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379; *Estate of Bell*, 131 Cal. 1, 63 Pac. 81, 668.) Even if it be subject to modification from time to time, in the discretion of the court, to meet the changed conditions of the estate or the varying necessities of the widow or the widow and children, a question which we do not now decide, yet this must be done upon motion directly made for that purpose. It may not be done by objection to the account.

But it is urged that it appears that the widow has purposely delayed the settlement of the estate in order that she might consume the whole of it by means of her allowance. This contention presents the question: How long may the allowance continue? May it continue indefinitely? If the estate is insolvent, it continues for one year. (Code Civ. Proc., sec. 2582.) If it is not insolvent, the allowance is made to continue "during the progress of the settlement of the estate." (Id.) The policy of the law is that the affairs of estates shall be settled and the assets distributed as speedily as possible. The expression "during the progress of the settlement of the estate," then,

must be construed to mean during the time reasonably necessary for that purpose. If so, the order, though regarded as a judgment, fixing a lien upon the assets of the estate must be presumed to have been satisfied when the time shall have arrived at which the estate may be settled; else the administrator may delay action until the whole estate is consumed and nothing be left to those who are entitled to a distributive share in its assets.

We do not think the law, though it is exceedingly regardful of widows and children, deprived, as they are, of their natural supporters, contemplates any such absurd result. The facts presented in this case aptly illustrate what might be the result if the opposite view be taken. As early at least as February 6, 1904, this estate was ready for distribution. What might have been done prior to that time it is not necessary now to inquire. At that time all creditors had been satisfied and all claims against the estate had been paid, including the widow's allowance, to the amount of \$2,085.61. The estate was small—of an appraised value not to exceed \$5,000—and yet the allowance paid and claimed up to that date amounted to \$3,124.90, and on March 21, 1905, to \$4,839.80. We think the court was justified, therefore, in the view that no further allowance should be made for the time after February 6, 1904, and that the assets of the estate should not be further taxed to pay it; for it is manifest that distribution should have been made at that time.

But we think that the court erred in striking out the item of \$1,039.29, the amount due on the allowance at that time. The order settling the account then filed was an appealable order. After the lapse of sixty days it became final and conclusive, and no item allowed therein could be called in question upon the settlement of a subsequent account. (Code Civ. Proc., sec. 2795; *In re Bell's Estate*, 142 Cal. 97, 75 Pac. 679.) To this extent the order is erroneous. In view of the provisions of the section last cited, the court had no power to review any former order and strike out items already adjudicated.

4. There is no merit in the contention of counsel for appellant that the respondents cannot object to the amount of the allowance claimed since February, 1904, because they could, at any time after that date, have compelled final settlement and distribution, but failed to do so. Their indulgence in the matter, however, furnishes no excuse for the neglect of the administratrix to settle the estate, when under the law she should have done so. She may not be heard to say that she should be further indulged on account of her own delays.

The matter is remanded to the district court with directions to modify the order so as to allow the item of \$1,039.29, and, when so modified, it will be affirmed.

Modified and affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

34	345
134	350

STATE EX REL. PAUWELYN, RELATOR, v. DISTRICT COURT
OF SECOND JUDICIAL DISTRICT ET AL., RESPOND-
ENTS.

(No. 2,318.)

(Submitted June 15, 1906. Decided July 6, 1906.)

*Certiorari—Probate Proceedings—Executors—Order of Sale—
Real Estate—Powers of Probate Court.*

Certiorari—Probate Courts—Order of Sale—Staying Execution.

1. The district court, sitting in probate, made an order of sale of certain real property to satisfy claims of creditors of the estate. Subsequently one of the devisees filed a petition that the property specifically devised to him be distributed to him. The court thereupon made an order requiring all persons interested in the estate to appear and show cause why the order prayed for should not be made, upon the execution by petitioner of an undertaking conditioned to pay his proportion of the debts of the estate, and directed the executor to postpone the sale until after hearing of the petition. *Held*, on *certiorari*, that the court had jurisdiction of the matter, and in determining it, to inquire into the condition of the estate and see whether a necessity for the sale still existed, and make its order accordingly, and that therefore the writ will not lie.

District Courts—Control of Process.

2. The district court has power to control its own process within just limits, and so to protect the rights of parties and prevent arbitrary and unwarranted action by its officers.

ORIGINAL application by the state, on the relation of Cyril Pauwelyn, as executor of the estate of James Tuohy, against the district court of the second judicial district, and Michael Donlan and Geo. M. Bourquin, judges thereof, for a writ of review. Application denied.

Mr. John J. McHatton, and Messrs. McBride & McBride, for Relator.

Mr. John B. Clayberg, Mr. T. J. Walsh, Messrs. Maury & Hogevoll, Mr. John A. Coleman, Mr. Wm. Scallon, and Mr. M. D. Leehey, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of review. On April 27, 1906, Daniel Shields, one of the devisees under the will of James Tuohy, deceased, filed his petition in the district court of Silver Bow county, wherein is pending the administration of the estate, and in the matter of the estate, asking that the property specifically devised to him be distributed to him, under the provisions of section 2835 of the Code of Civil Procedure. The contents of this petition it is not necessary to notice. On the following day the court made an order requiring all persons interested in the estate to appear and show cause why the order should not be made, upon the execution to the executor by Shields of an undertaking in such amount as the court might require, conditioned to pay his proportion of the debts of the estate. The order also directed the executor to postpone the sale of the particular property under an order of sale theretofore made and affirmed by this court on appeal (*In re Tuohy's Estate*, 33 Mont. 230, 83 Pac. 486), until after the hearing could

be had. The executor applied to the court for an order vacating this order in so far as it directed him to postpone the sale. This application was denied. Thereupon application was made by him to this court for a writ to annul the order to show cause in so far as it stayed his proceedings under the order of sale.

The contention made by counsel is that an order of sale is final and conclusive upon all those interested in an estate, as well as upon the court; that after it is made nothing remains to be done but to execute it, no matter what may be the condition of the estate or what has occurred since the making of the order; and that the court has no jurisdiction to entertain a petition for distribution or to stay proceedings under the order of sale.

An application for an order of sale is in the nature of an action to foreclose a lien upon the property of the estate to pay the debts and expenses and other like charges, and is closely assimilated in many of its aspects with a proceeding to foreclose a mortgage. The order is the decree (*Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 544, 546), and the administrator or executor is the officer appointed by law to carry it into execution. In the performance of this duty he occupies very much the position of a sheriff in executing the decree by making foreclosure sale. When in either case the proceedings have terminated in the order or decree, the action of the court cannot be changed or reviewed, except on motion for a new trial or on appeal. As to all issues necessarily involved, the determination becomes final and conclusive. Assent to these propositions, however, does not involve assent also to the proposition that the court may not control its officers in the performance of their functions under the process in their hands or recall process already issued, when the circumstances of the case require such action. To illustrate: A sheriff has execution in his hands of foreclosure. He is tendered by the defendant the full amount of the debt, with all charges. Yet he insists that he must proceed to advertise and sell. It would be the manifest duty of the court under such circumstances to recall the execution and compel the acceptance of the money. This power is inherent in every court,

and is necessarily implied by the law from which its powers are derived, whether such powers be general or special and limited. Every court must of necessity have the power to control its own process; not arbitrarily, of course, but within just limits, to protect the rights of parties and prevent arbitrary and unwarranted action by its officers. So, where the administrator or executor is proceeding to sell the property of an estate, if circumstances have arisen since the making of the order dispensing with the necessity of a sale, the court may order him to proceed no further.

While the district court when sitting in probate matters has limited powers, it has all power incidentally necessary to exercise properly these limited powers, including the power to accept and enforce a compromise of a will contest and the like. (*In re Davis' Estate*, 27 Mont. 490, 71 Pac. 757.) Such incidental or implied power extends to all matters over which the court has jurisdiction. What action the court may take in the particular case must be determined upon the facts and circumstances presented.

Section 2835 of the Code of Civil Procedure provides that an application for partial distribution may be made at any time after the lapse of one year from the issuance of letters. Ordinarily the result of an order of sale would seem to be to cut off the right to have distribution, because the creditors have an absolute right to have their liens foreclosed. But, if the circumstances are such as to warrant it, the court may not only entertain the petition but grant the order prayed for, notwithstanding the order of sale has been made. At any rate, the court has jurisdiction to inquire into the situation of the case and make its order as the circumstances require. If it appears that the condition of the estate is so changed that a sale is no longer necessary—for instance, that the heirs or devisees, in order to save the property, have satisfied the claims of creditors—the lien of the creditors is discharged, and the duty to stop the sale and preserve the property is manifest. The court upon such application may decide wrong, as well as right; but,

if it goes wrong, there is a remedy by appeal. (*In re Davis' Estate*, 27 Mont. 233, 70 Pac. 7...)

The court having jurisdiction of the matter, both to hear and determine it, this court may not interfere. The application is therefore denied.

Writ denied.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, being disqualified, takes no part in this decision.

STATE EX REL. PAUWELYN, RELATOR, v. DISTRICT COURT
OF SECOND JUDICIAL DISTRICT ET AL., RESPOND-
ENTS.

(No. 2,317.)

(Submitted June 15, 1906. Decided July 6, 1906.)

*Prohibition—Probate Courts—Jurisdiction—Order of Sale—
Stay of Execution.*

1. Prohibition does not lie to restrain the district court, while sitting in probate matters, from hearing the petition of one of the devisees under a will, for distribution to him of that portion of the estate specifically devised to him, even though it had theretofore made an order to sell the real property to pay the debts of the estate, the court having had jurisdiction to hear and determine the matter. (See, also, syllabus in *State ex rel. Pauwelyn v. District Court et al.*, ante, p. 345, 86 Pac. 269.)

APPLICATION by the state of Montana, on the relation of Cyril Pauwelyn, as executor of the estate of James Tuohy, for a writ of prohibition against the district court of the second judicial district of the state of Montana, and Michael Donlan and Geo. M. Bourquin, as judges thereof. Writ denied.

Messrs. McBride & McBride, and Mr. John J. McHatton, for Relator.

Mr. Jno. B. Clayberg, Messrs. Maury & HogevoU, Mr. T. J. Walsh, Mr. John A. Coleman, Mr. M. D. Leehey, and Mr. Wm. Scallon, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Prohibition. Soon after the application to the district court referred to in *State ex rel. Pauwelyn v. District Court, ante*, p. 345, 86 Pac. 269, the Roman Catholic bishop of Helena, as a corporation sole, being also a devisee under the will of James Tuohy, deceased, made an application to the district court for a similar order of partial distribution. The court issued an order to show cause and an order to the executor to stay proceedings under the order of sale until a hearing could be had. Thereupon application was made to this court for a writ of prohibition to restrain the court from proceeding further under the order to show cause, on the ground that it was proceeding in excess of jurisdiction.

The principle applied in the case of *State ex rel, Pauwelyn v. District Court, ante*, p. 345, 86 Pac. 269, is conclusive of this case, and under the authority of that case the writ is denied.

Writ denied.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, being disqualified, takes no part in this decision.

STATE EX REL. CASCADE COUNTY, APPELLANT, v. LEWIS
AND CLARK COUNTY ET AL., RESPONDENTS.

(No. 2,280.)

(Submitted June 9, 1906. Decided July 6, 1906.)

*Mandamus—Counties—Change of Venue—Criminal Cases—
Liability for Costs.*

Counties—Attorneys—Change of Venue—Liability for Costs—*Mandamus*.

1. Where a criminal cause is removed from one county to another for trial, it is the duty of the county to which it is transferred to furnish a prosecuting officer, and if for any reason its county attorney is unable to act as such officer in the trial of the cause and the court appoints special counsel to represent the state, the cost incident to his employment is not a proper charge against the county from which the change of venue was had, and therefore *mandamus* will not issue to compel its payment by that county.

Counties—Change of Venue—Costs—Certification by Judge—Effect.

2. The mere certification of the costs resulting from the removal of a cause for trial from one county to another, required to be made by the trial judge under Political Code, section 4683, to the board of county commissioners of the county where the trial was had, may not be said to have the force and effect of a judgment against the county from which the cause was transferred, where no action was pending to which it was a party.

(MR. JUSTICE MILBURN dissenting.)

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by the state, on the relation of Cascade county, against the county of Lewis and Clark and others. Judgment for respondents, and relator appeals. Affirmed.

Mr. William T. Pigott, and Mr. Howard S. Greene, for Appellant.

The district court of Cascade county determined and certified that the costs of the trial of *State v. Keerl*, were \$5,150.75. This finding cannot be collaterally attacked. The finding was one which the court had power to make, and neither the finding nor

the certificate touching the amount of costs may be assailed indirectly. (*Territory v. Yellowstone County*, 6 Mont. 147, 9 Pac. 918; *Mayor v. Territory*, 1 Okla. 188, 31 Pac. 191, 21 L. R. A. 841.)

The presumption is that both counties were represented at the time when the amount of costs chargeable to Lewis and Clark county was inquired into, and nothing to the contrary is alleged. There was no objection to the action of the court. If there be a way whereby the decision may be reviewed, it is either by appeal or by an action directly challenging the finding. For the purposes of this proceeding in *mandamus*, the finding and certificate are final. (*Territory v. Yellowstone County, supra*; *Mayor v. Territory, supra*.) If error there was it was judicial error within, and not in excess of, the jurisdiction of the district court of Cascade county; hence, the question whether the court erred cannot be raised indirectly. (*Burke v. Inter-State S. & L. Assn.*, 25 Mont. 321, 87 Am. St. Rep. 416, 64 Pac. 879.)

Counsel appointed to defend paupers must serve, unless excused for good reason appearing to the court; and he must serve without fee or monetary reward. The court orders and directs him to represent the defendant. But the court cannot compel counsel to prosecute or aid in prosecution. A lawyer appointed to prosecute may, for any reason or for no reason other than disinclination, decline to accept the appointment and in so doing keep strictly within the limits of his rights. If an attorney consents to perform that which becomes his duty because he accepts the appointment, he thereby accedes to the request of the court, and is entitled to compensation. (*Tull v. State*, 99 Ind. 238.)

All expenses incident to the administration of justice fall upon counties, except where there is express legislative provision for the payment of expenses by the state. This statement, it is believed, will not be disputed. (*State ex rel. Lindabury v. Ocean County*, 47 N. J. L. 417, 1 Atl. 701; *Tull v.*

State, supra. See, also, *Shawnee County v. Waubaussee County*, 4 Kan. 267.)

Mr. C. A. Spaulding, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prior to July, 1904, there had been filed in the district court of Lewis and Clark county an information charging James S. Keerl with the crime of murder. On July 21, 1904, the defendant Keerl moved for a change of venue, which motion was granted and the cause transferred for trial to Cascade county. When the case was called in the district court, it appeared that the county attorney of Cascade county, H. S. Greene, was disqualified, having theretofore been retained as counsel by Keerl prior to his (Greene's) election. Upon this fact appearing, the court appointed R. W. Berry, Esq., an attorney at law residing in Great Falls, to represent and conduct the prosecution of the case. Mr. Berry fully performed the duties required of him by the appointment, and after the conclusion of the trial the district court made an order fixing the compensation of Mr. Berry and providing for its payment, as follows: "It is now ordered, that said R. W. Berry be, and he is hereby allowed \$600 as compensation for his services, which is hereby adjudged to be reasonable compensation for his services in representing the state in said cause while pending in this court, and the treasurer of Cascade county is hereby directed to pay the same." This order Mr. Berry presented to the treasurer of Cascade county and received payment. Afterward the district court and clerk certified to the board of county commissioners of Cascade county the costs allowed in the case of *State v. Keerl*, including therein the item of \$600 allowed to Mr. Berry, and the board of county commissioners audited the same and drew their warrant on the treasurer of Lewis and Clark county for the amount so certified by the district court, and also forwarded a certified copy of the total amount of costs allowed

by the court, giving each item thereof. This certified copy was received by the commissioners of Lewis and Clark county, who entered in their books as proper charges against Lewis and Clark county all of the items thereof, except the item of \$600 allowed to Mr. Berry, and this item they refused to enter.

When the warrant from the commissioners of Cascade county was presented to the treasurer of Lewis and Clark county, he paid all thereof except the said sum of \$600, and this he refused to pay, although he had in his possession as such treasurer sufficient moneys in the general fund to pay the same. Thereupon this proceeding was instituted by the state on the relation of Cascade county to secure a writ of mandate to compel the board of county commissioners of Lewis and Clark county to enter this item of \$600 as a proper charge against Lewis and Clark county, and to compel the treasurer of Lewis and Clark county to pay the same. An affidavit was filed setting forth the facts substantially as herein narrated, and upon this affidavit an alternative writ of mandate was issued, and upon the return respondents demurred to the affidavit and moved to quash the alternative writ on the ground, generally speaking, that neither the affidavit nor the alternative writ states facts sufficient to entitle the relator to any relief as against these respondents. The demurrer and the motion were sustained, and the relator having failed to plead further, judgment was entered in favor of respondents, from which judgment the relator appealed.

Unless the item of \$600 is a proper charge against Lewis and Clark county, the writ of mandate will not issue to direct its payment. (Code Civ. Proc., sec. 1961.) When a cause is transferred for trial from one county to another, it is to be taken up and tried in the county to which it is transferred in all respects the same as if it had arisen in that county. It was the duty of the county attorney of Cascade county to prosecute this case (*State v. Whitworth*, 26 Mont. 107, 66 Pac. 748), and the reason why he did not do so is entirely immaterial to this inquiry. Had he done so, it could not be contended that

Lewis and Clark county should pay that portion of his salary earned during the time occupied in the trial of this case. It was simply the duty of Cascade county to furnish a county attorney to prosecute this case without expense to Lewis and Clark county; and it was immaterial to Lewis and Clark county whether Mr. Greene, the attorney general, or some other attorney performed the duty.

Assuming, but not deciding, for the question is not before us, that the word "costs" used in sections 4682 and 4683, Political Code, has a broader meaning than the same word when used elsewhere in the Codes, still the costs which Lewis and Clark county is required to pay to Cascade county are such only as Lewis and Clark county would have been called upon to pay on account of the trial of this particular case, had it been tried at home; in other words, such costs as necessarily attach to a like case with respect to which the county attorney performs the duties of his office. The board of the prisoner, the sheriff's mileage in taking him to the place of trial, the mileage of the sheriff in getting jurors and witnesses for this particular trial, the mileage and *per diem* of such jurors and witnesses, the *per diem* of the bailiffs, and possibly some other like items, would be all that could possibly be said to arise out of this particular trial under the most liberal views which can be taken of the meaning of the word "costs" used in the sections above.

Under our system of laws, where the prosecuting officer is paid a salary and not fees, where his compensation is fixed by law and does not depend upon the amount of business transacted, the compensation is paid just the same whether a particular case is tried or not. Under the fee system which prevailed here in territorial days, the contention of Cascade county might, possibly, be maintained.

Under section 4683, above, it is made the duty of the court, trying a case removed to that court for trial from another county to certify to the board of county commissioners of the county to which such case is removed the costs necessarily

incurred on account of the removal and trial of that particular case. As said before, had Cascade county furnished its county attorney, or, in case of his inability for any cause to perform the duty of his office, secured the services of the attorney general to prosecute this case, then Lewis and Clark county would not have been called upon to pay the compensation of such prosecuting officer, for such compensation would not have been costs arising out of or incident to the trial of this particular case. If for any reason Cascade county saw fit to furnish some one else to perform the duty imposed by law upon it, the reason which impelled it to do so is not of any concern to Lewis and Clark county. The order made by the district court of Cascade county, fixing the compensation of Mr. Berry and directing the county treasurer of Cascade county to pay it, indicates very strongly that it was an afterthought that this item should be charged to Lewis and Clark county. There would be no difference in principle whatever in asking Lewis and Clark county to pay the salaries of the sheriff and the clerk of the district court of Cascade county for the time consumed in the trial of this case.

Whatever may be said of the decision in *Territory v. Yellowstone County*, 6 Mont. 147, 9 Pac. 918, that case is clearly distinguishable from this one. The statute in force in 1886 was very different from section 4683 above.

No importance whatever can be attached to the provision directing the district court to certify the costs to the board of county commissioners. The district clerk might, with equal propriety, have been selected to perform the duty, for it did not require any judicial determination. There was not any action or proceeding pending to which Lewis and Clark county was a party, and therefore the mere certification of the costs by the district court could not, in the very nature of things, have had the force or effect of a judgment against Lewis and Clark county. In support of this view, see *Board v. Summerfield*, 36 Ind. 543, and *Trant v. State*, 140 Ind. 414, 39 N. E. 513.

The questions whether the court had authority to appoint Mr. Berry, fix his compensation, or the reasonableness of the compensation so fixed, are not in dispute, and therefore are not considered.

In our view of the case the item of \$600 was not a proper charge against Lewis and Clark county, and therefore *mandamus* will not issue to compel its payment, or to compel the board of county commissioners to enter it as a charge against Lewis and Clark county. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN dissents.

Rehearing denied October 29, 1906.

KNIGHTS OF MACCABEES OF THE WORLD, RESPOND-
ENT, v. SACKETT, APPELLANT.

(No. 2,278.)

(Submitted June 8, 1906. Decided July 6, 1906.)

Life Insurance—Mutual Benefit Associations—Change of Beneficiary—By-laws—Waiver—Agency—Mail.

Life Insurance—Mutual Benefit Associations—Change of Beneficiary.

1. A member of a benefit life insurance association has a right to change the beneficiary named in his certificate of insurance, by complying with the by-laws of the association governing the subject.

Same—By-laws—Waiver.

2. Any waiver of a strict compliance with the by-laws of a benefit life insurance association governing a change of beneficiary, must have occurred during the lifetime of the insured, and when so waived the former beneficiary upon the death of the insured cannot take advantage of a noncompliance with the rules covering the matter.

Same—Payment of Insurance Money into Court—Effect.

3. By paying into court the money due on a life insurance policy issued by a fraternal benefit association, the association waived the failure of insured to comply strictly with the by-laws of the order governing a change of beneficiary, but such waiver could not impair rights of the beneficiary which became vested on the death of the insured.

Same—Change of Beneficiary—Requirements.

4. With respect to mutual benefit insurance, it is a general rule that in making a change of beneficiary, the insured must proceed in accordance with the regulations contained in the policy and by-laws of the association, and any material deviation from the course therein indicated will invalidate the transfer.

Same—Change of Beneficiary—Mailing—Agency.

5. The by-laws of a fraternal life insurance association provided that a change of beneficiary should take effect upon delivery to the local record-keeper of a written request for such change. The insured placed his written request for change of beneficiary in the mail for delivery into the postoffice of the place where the record-keeper resided. Before delivery, insured died. *Held*, that by depositing the paper in the mail the insured constituted it his agent and assumed the risk of failure of delivery, or that it would not be made until a date too late to be of any effect, that the failure of the agent was his failure, and that therefore the contemplated change was not effectuated.

Same—Change of Beneficiary—Receipt of Application After Death of Insured—Effect.

6. The fact that a written request for a change of beneficiary in a policy of insurance issued by a mutual benefit association, the by-laws of which provided that such change should take effect only upon delivery to the local record-keeper of a request in writing therefor, had been placed in the mail for delivery and was actually received within about six hours after the death of the insured, could not affect the interest of the beneficiary named in the policy, whose title to the amount called for in it attached instantly upon the death of the insured.

Same—Change of Beneficiary—Receipt of Application After Death of Insured—Equity.

7. *Held*, that the doctrine that a court of equity will decree that to be done which ought to be done, did not apply where a member of a benefit life insurance association had, in an attempt to comply with its by-laws relative to a change of beneficiary, placed a written request for such change in the mail but, before delivery thereof in the postoffice of the place of residence of the local keeper of records, the insured died, he, by failure of his agent to deliver the request in time, not having done all that was incumbent upon him to do to make the change effectual.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by the Knights of the Maccabees of the World against Clarence M. Sackett and Fannie Sackett. From a judgment in favor of defendant Fannie Sackett, defendant Clarence M. Sackett appeals. Affirmed.

Mr. O. F. Goddard, for Appellant.

The association waived the failure of the deceased to lodge the request for change of beneficiary with the local record-

keeper before he died, such provision of the by-laws of the association being for its benefit. (*Titsworth v. Titsworth*, 40 Kan. 571, 20 Pac. 213; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768; *Splawn v. Chew*, 60 Tex. 536; *Jory v. Supreme Council*, 105 Cal. 20, 45 Am. St. Rep. 17, 38 Pac. 524, 26 L. R. A. 733; *Hall v. Allen*, 75 Miss. 175, 65 Am. St. Rep. 601, 22 South. 15. See, also, *Schmidt v. Iowa etc. Assn.*, 82 Iowa, 304, 47 N. W. 1032, 11 L. R. A. 205; *Rollins v. McHatton*, 16 Colo. 207, 208, 25 Am. St. Rep. 260, 27 Pac. 254; 1 Bacon on Benefit Societies, secs. 310, 310a.)

If the society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. (*Martin v. Stubblings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Manning v. Ancient Order*, 86 Ky. 136, 9 Am. St. Rep. 270, 5 S. W. 385; *National Mut. Aid Society v. Lupold*, 101 Pa. St. 111; *Byrne v. Casey*, 70 Tex. 247, 8 S. W. 38.)

If the insured has pursued the course pointed out by the by-laws of the association, and has done all in his power to change the beneficiary, but before a new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done, and act as though a certificate had been issued. (*McGowan v. Supreme Court of Independent Order of Foresters*, 104 Wis. 173, 80 N. W. 603; *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554, 66 N. E. 670, 61 L. R. A. 791; *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; 2 May on Insurance, sec. 399; *Schoenau v. Grand Lodge A. O. U. W.*, 85 Minn. 349, 88 N. W. 999; *Sanborn v. Black*, 67 N. H. 537, 35 Atl. 942.)

If the insured has done substantially all that is required by him, and that which remains to be done are ministerial acts of the officers, the change will take effect though the formal details were not complied with before the death of the insured. (*St.*

Louis Police Relief Assn. v. Strode, 103 Mo. App. 694, 77 S. W. 1091; *Donnelly v. Burham*, 177 N. Y. 546, 69 N. E. 1122; *Hall v. Allen*, 75 Miss. 175, 65 Am. St. Rep. 601, 22 South. 4; *Moan v. Normile*, 37 App. Div. 614, 56 N. Y. Supp. 339; *John Hancock Mut. Life Ins. Co. v. White*, 20 R. I. 457, 40 Atl. 5; *Manning v. A. O. U. W.*, 86 Ky. 136, 9 Am. St. Rep. 270, 5 S. W. 385; *Titsworth v. Titsworth*, *supra*; *Schmidt v. Iowa Knights of Pythias*, 82 Iowa, 304, 11 L. R. A. 205, 47 N. W. 1032; *Grand Lodge A. O. U. W. v. Child*, 70 Mich. 163, 38 N. W. 1; *Luhrs v. Luhrs*, 123 N. Y. 367, 20 Am. St. Rep. 754, 9 L. R. A. 534, 25 N. E. 388.)

Upon the general doctrine that the society may waive compliance with its rules and that the first beneficiary cannot object to the manner of change because it was not in strict conformity to the law of the society, we cite the following additional leading cases: *Supreme Lodge Order Golden Chain v. Terrell*, 99 Fed. 330; *Depee v. Grand Lodge A. O. U. W.*, 106 Iowa, 747, 76 N. W. 798; *Cade v. Head Camp W. O. W.*, 27 Wash. 218, 67 Pac. 603; *Hirschl v. Clark*, 81 Iowa, 200, 47 N. W. 78, 9 L. R. A. 841.)

Mr. W. M. Johnston, for Respondent.

The rights of the beneficiary in a certificate in a benefit society differ from the rights of a beneficiary in old line life insurance in that the right of the former is inchoate until the death of the member, when the right of the beneficiary becomes fixed and certain. The death of the insured in this case having occurred before the application for change of beneficiary was received by Mr. Brown, the right of this defendant became fixed and certain and could not therefore be defeated. (*McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; *Mason v. Mason*, 160 Ind. 191, 65 N. E. 585; *Stringham v. Dillon*, 42 Or. 63, 69 Pac. 1020; *Pennsylvania R. Co. v. Warren* (N. J.), 60 Atl. 1122; *Grace v. Northwestern etc. Assn.*, 87 Wis. 562, 41 Am. St. Rep. 62, 58 N. W. 1041; *Modern Woodmen of America v. Little*, 114 Iowa, 109, 86 N. W. 216; *Brown v. A. O. U. W.*, 208 Pa. St.

101, 57 Atl. 176, 177; *Independent Order Foresters v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324; *Woodmen Acc. Assn. v. Hamilton* (Neb.), 97 N. W. 1017; *Hofman v. Grand Lodge*, 73 Mo. App. 47.)

Where, as in this case, the application was not in the hands of the proper officer prior to death of insured, it has almost, if not quite, uniformly been held that the application was made too late and the first beneficiary is entitled to the fund. (*Counsman v. Modern Woodmen of America* (Neb.), 96 N. W. 672, 98 N. W. 414; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682, 34 N. W. 470; *Ireland v. Ireland*, 42 Hun, 212; *Gladding v. Gladding*, 56 Hun, 639, 8 N. Y. Supp. 880; *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506; *Hamilton v. Royal Arcanum*, 189 Pa. St. 273, 42 Atl. 186; *Smith v. Harman*, 59 N. Y. Supp. 1044, 28 Misc. Rep. 681; *Berg v. Damkoehler*, 112 Wis. 587, 88 N. W. 606; *I. O. O. F. v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324; *Legion of Honor v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770; *Stringham v. Dillon*, 42 Or. 63, 69 Pac. 1020; *Modern Woodmen of America v. Little*, 114 Iowa, 109, 86 N. W. 216; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166-170; *Knights of Honor v. Nairn*, 60 Mich. 44, 26 N. W. 826-829; *Shuman v. A. O. U. W.*, 110 Iowa, 642, 82 N. W. 331; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116-119. See, also, *Eagan v. Eagan*, 58 App. Div. 253, 68 N. Y. Supp. 777; *Tillman v. John Hancock M. L. I. Co.*, 27 App. Div. 392, 50 N. Y. Supp. 470.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Floyd L. Sackett was a member of the order of the Knights of the Maccabees of the World, having his membership in the local tent at Park City, Montana. He carried insurance on his life in the association to the amount of \$1,000, his wife, Fannie Sackett, being named in the certificate of insurance as beneficiary. For some time prior to May, 1905, Floyd L. and Fannie Sackett had not lived together. The former made his home at

Yule, North Dakota. The latter lived at Park City, Montana. Prior to May, 1905, Floyd L. Sackett wrote a letter to his mother at Park City, requesting her to call on the local record-keeper of the tent of which Floyd L. Sackett was a member, and ask him to change the beneficiary in his certificate of insurance from Fannie Sackett to Clarence M. Sackett and wife. This request was accompanied by the required fee of 50 cents. The request was made of the local record-keeper by the mother of the insured, but she was thereupon informed that under the by-laws of the order the wife of Clarence M. Sackett could not be named as a beneficiary, and the record-keeper then filled out a proper application for change of beneficiary upon a blank form furnished by the association and mailed the same to Floyd L. Sackett, to be by him duly executed. This he did on May 8, 1905, and in the certificate he named his brother, Clarence M. Sackett, as sole beneficiary, and deposited this application in the postoffice at Yule, North Dakota, properly addressed to the local record-keeper at Park City. The letter containing this application was carried to Sentinel Butte, the nearest railroad point, in the usual course of business, and was taken by the westbound Northern Pacific train No. 3 on May 9th. This train passed through Park City in the early morning of May 10th; but train No. 3 in the course of its business did not leave mail at Park City, but carried the mail for that point on west until it met train No. 2, eastbound, when the mail for Park City was transferred to train No. 2 and by that train left at Park City. The letter containing this application was therefore not delivered at Park City until May 10th at about 3 P. M., and was received by the local record-keeper immediately thereafter. In the meantime, however, Floyd L. Sackett on May 10th received a fatal wound and died at 9:45 A. M. of that day. Not knowing of Floyd L. Sackett's death, the local record-keeper forwarded the application with the fee, to the supreme tent at Port Huron, Michigan, where on May 17th a new certificate was issued, in which Clarence M. Sackett was named as beneficiary. This new

certificate was received at Park City on May 21st and delivered to Clarence M. Sackett.

After the death of Floyd L. Sackett both Fannie and Clarence M. Sackett made claim to the insurance money, and, in order to be relieved from annoyance, the governing body of the association commenced this action, setting forth these facts and asking that the claimants be brought into court and made to litigate their respective claims. The money was paid into court, the plaintiff association relieved from further liability, and the contending claimants then agreed upon the facts substantially as herein set forth. Upon this agreed statement of facts the court found the issues in favor of Fannie Sackett, and judgment in her favor was entered, from which Clarence M. Sackett appealed.

The contentions of appellant are succinctly set forth in his brief as follows: "Upon the foregoing statement of facts we assert the following propositions: 1. The deceased had a right to change the beneficiary in his certificate of insurance by complying with the by-laws of the association. 2. If he failed to comply with all of the by-laws of the association regarding such change, and the association waived such requirements not complied with, the association alone having the right to insist upon a full compliance with its by-laws, the respondent cannot take advantage of such failure. 3. The deceased did all he could before his death to make the change of beneficiary from his wife to his brother (the appellant). The association, by voluntarily interpleading and paying the money into court, has waived non-compliance with its by-laws, and the court will consider that done which ought to be done."

1. The first contention may be conceded. It is too well settled to be open to argument.

2. As a legal proposition, the second contention is not stated accurately. It should be to the effect that, if the insured failed to comply with all of the by-laws of the association regarding such change, and the association *during his lifetime* waived such requirements not complied with, the association alone having the right to insist upon a full compliance with its by-laws, the former

beneficiary could not take advantage of such failure. As thus stated there cannot be any question of the correctness of this contention, and as we understand him, counsel for respondent does not controvert the same.

That any waiver by the association must occur during the lifetime of the insured is too well settled in reason and by the authorities to require extended notice. The association contracts that it will at the death of the insured pay to the person named as beneficiary the amount of the policy. It is a contract between the association and the insured for the benefit of a third person, and the only interest of the beneficiary is in expectancy, until the death of the insured vests in the beneficiary the right to claim the amount of the benefit, and immediately upon the happening of that contingency a right of action in favor of the beneficiary arises which the courts will enforce. This being so, the reason for the rule that after the death of the insured the association cannot waive anything to the prejudice of the beneficiary is perfectly apparent; and that this is the rule is beyond question. (1 Bacon on Benefit Societies and Life Insurance, sec. 308; *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506; *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682, 34 N. W. 470; 3 Am. & Eng. Ency. of Law, 2d ed., 998.) By paying the money into court the association waived, so far as it could do so, the failure of the insured to comply strictly with the by-laws of the order; but such waiver could not impair rights which became vested upon the death of the insured.

3. With respect to mutual benefit insurance, it is well settled that the insured may at will change the beneficiary. It is a general rule that in making such change the insured must proceed in accordance with the regulations contained in the policy and by-laws of the association, and any material deviation from the course thus marked out will invalidate the transfer; but to this rule certain exceptions have been noted. In a leading case upon this subject these exceptions are announced as follows:

"1. If the society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued.

"2. If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made.

"3. If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary; but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued." (*Supreme Conclave Royal Adelpia v. Cappella* (C. C.), 41 Fed. 1.)

Neither the first nor the second of these exceptions is relied upon here. The last contention of appellant, however, is that Floyd L. Sackett had brought himself within the third exception above, and a court of equity ought to decree the change of beneficiary from Fannie to Clarence M. Sackett to have taken place prior to the death of Floyd L. Sackett. We are called upon to say, then, whether, under the facts agreed upon, Floyd L. Sackett had done all that he could do prior to his death to effect the change of beneficiary.

The by-laws of this association provide the method to be pursued by the insured in order to make this change. They also provide that the change shall take effect upon delivery to the local record-keeper of the old certificate, or, in case of its loss, proof of such loss, with a written request for such change, designating the new beneficiary. In this instance the old certificate was not lost, but it must be conceded that the association could waive failure to deliver it. The first application for a change made by Floyd L. Sackett did not comply with the by-laws of the association in a number of respects, and particularly in that it sought to make the wife of Clarence M. Sackett a beneficiary, whereas by the by-laws of the order she could

not be such; and the association not only did not waive these defects, but refused to make the change. However, the local record-keeper sent to Floyd L. Sackett an application for change, to be executed by the insured, in which he should name some qualified person as beneficiary. It does not appear that there was an obligation resting on the local record-keeper to do this, and it was apparently a gratuitous act on his part. This blank application was received by Floyd L. Sackett and duly executed by him. He then attempted to deliver it to the local record-keeper as he was required to do. He chose the United States mail as the agent to make the delivery for him. He might have taken it himself, or sent it by messenger personally. But in any event he had to assume the risk that the agent employed would fail to deliver the request at all, as in case of destruction of the mail en route, or the death of the messenger, or that delivery would not be made until a date so late as to be of no effect. No importance whatever is to be attached to the fact that he selected the mail as the agent to make this delivery for him. It was nevertheless his agent. (*Peabody v. Satterlee*, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956; *McCorkle v. Texas Benevolent Assn.*, 71 Tex. 149, 8 S. W. 516.) In this instance the agent which he chose delivered his request in the ordinary course of business; but before delivery was made, the insured died.

At the time of the death of the insured his request for such change had not been delivered; and the case is not made different by the fact that it was actually delivered on the day of his death and only about six hours after that event occurred. If delivery one hour after his death would work the change of beneficiary, then delivery a week or a month after death would be equally effective. But such is not the law. The interest of the beneficiary attaches instantly upon the death of the insured, and the question whether a change has been effected must be determined as of that particular instant of time. In this instance there was simply a failure on the part of the agent employed by the insured to make the delivery to the local record-keeper before the death of the insured.

With reference to that particular point of time the failure was just as complete as it would have been had the letter containing the request been lost long before the train carrying it reached Park City. Had the letter been delivered into the postoffice at Park City prior to the death of the insured, and there merely awaited the call of the local record-keeper for his mail, a case akin to those wherein equity has applied the rule that that will be deemed done which ought to have been done, might have been presented, and the transfer made to date from the time when it would have become effective, had the local record-keeper promptly called for his mail. Instances of the character of the case just supposed are to be found in the reported cases. *Jory v. Supreme Council*, 105 Cal. 20, 45 Am. St. Rep. 17, 38 Pac. 524, 26 L. R. A. 733; *Luhrs v. Luhrs*, 123 N. Y. 367, 20 Am. St. Rep. 754, 25 N. E. 388, 9 L. R. A. 534; *Hall v. Allen*, 75 Miss. 175, 65 Am. St. Rep. 601, 22 South. 4; *Sanborn v. Black*, 67 N. H. 537, 35 Atl. 942; *Hancock Mut. L. I. Co. v. White*, 20 R. I. 457, 40 Atl. 5; and *Supreme Conclave Royal Adelpia v. Cappella* above—are all cases of this character; but every one is easily distinguishable from the case now under consideration.

When Floyd L. Sackett died he had not delivered to the local record-keeper his request for a change. He had intended to do so, but the agency selected by him failed to deliver the request until after his death. The failure of his agent was his failure. When he died, the title of Fannie Sackett to this money became absolute, and the receipt of the request by the local keeper subsequently to the death of Floyd L. Sackett did not affect her right; for the association had become her debtor for the full amount of the insurance. The case of *Fink v. Fink*, above, is well considered, is directly in point here, and, in our opinion, correctly states the rule as we have announced it.

The judgment of the district court is affirmed.

Affirmed.

MR CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

FAUST, RESPONDENT, v. RUSTLER MINING AND MILLING
COMPANY ET AL., APPELLANTS.

(No. 2,284.)

(Submitted June 9, 1906. Decided July 6, 1906.)

Appeal—Undertakings—Sufficiency.

Appeal—Bond—Sufficiency.

1. A bond on appeal from an order appointing a receiver, and from an order refusing to vacate the appointment, which recites that in consideration of "such appeal" defendant, as principal, and his surety, undertake to pay all damages and costs which may be awarded against defendant "on the appeal," is void for uncertainty in that it cannot be ascertained therefrom for which of the two appeals liability is assumed, and confers no jurisdiction on the appellate court.

Appeal—Void Undertakings—Curing Defects.

2. Where an appeal bond is void, a new undertaking approved by one of the justices of the supreme court, filed before the motion to dismiss was submitted, did not give the court jurisdiction of the appeal, since, under Code of Civil Procedure, section 1740, such supplemental bond is only permissible where the original undertaking is merely insufficient and not void.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

ACTION by L. H. Faust against the Rustler Mining and Milling Company and others. From an order appointing a receiver, and from an order refusing to vacate the appointment, defendant the Rustler Mining and Milling Company appeals. Dismissed.

Messrs. Grubb & Rhoades, and Mr. C. H. Foot, for Appellant Rustler M. & M. Co.

Messrs. McIntire & Kendall, and Mr. D. F. Smith, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeals from an order appointing a receiver to take charge of the property and business of the defendant corporation, the

Rustler Mining and Milling Company, *pendente lite*, and from an order refusing to vacate the order of appointment.

Soon after the transcript was filed with the clerk of this court the plaintiff interposed a motion to dismiss the appeals on the ground, among others which it is not now necessary to consider, that the undertaking is void. The undertaking recites that whereas the defendant has appealed from the order appointing a receiver of the property, affairs and effects of the defendant, and also from the order overruling the application to vacate and set aside said order appointing the receiver, "Now, therefore, in consideration of the premises and such appeal," the defendant, as principal, and the surety company (naming it), as surety, undertake that appellant will pay all damages and costs which may be awarded against the appellant "on the appeal," etc., not exceeding \$600.

After some consideration of the question presented, the decision of the motion was deferred until the hearing on the merits, for the reason that the court was not satisfied that the undertaking was wholly defective and desired argument of counsel. After further consideration, however, we have concluded that, under the rule of construction laid down in *Creek v. Bozeman Waterworks Co.*, 22 Mont. 327, 56 Pac. 362, *Washoe Copper Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866, and *Baker v. Butte City Water Co.*, 24 Mont. 113, 60 Pac. 817, the undertaking is not valid for any purpose. The form of it is exactly the same in substance as were the undertakings in these cases, the only difference being the amount of the penalty. This feature can make no difference, however, in the application of the rule, for the use of the expressions "such appeal" and "the appeal" renders it impossible to determine with any degree of certainty the one of the appeals with reference to which liability is assumed.

Before the motion was submitted, a new undertaking, approved by the chief justice, was filed with the clerk of this court, upon the theory that the undertaking is merely defective and not void. This cannot avail to sustain the appeals. Section 1740 of the Code of Civil Procedure permits such a

course only when the original undertaking is merely insufficient and not void. (*Pirrie v. Moule*, 33 Mont. 1, 81 Pac. 390.)

The undertaking being void, this court has no jurisdiction to consider the appeals on the merits. The motion is therefore sustained.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

THOMAS, APPELLANT, v. BOSTON AND MONTANA CON.
COPPER AND SILVER MINING COMPANY, RE-
SPONDENT.

(No. 2,286.)

(Submitted June 11, 1906. Decided July 6, 1906.)

Appeal—Trial—Instructions—Requests—Necessity—Bonds.

Appeal—Instructions—Request—Necessity.

1. Where appellant neglected to request the trial court to insert certain propositions of law alleged to have been favorable to him, in its instructions to the jury, he may not complain of their omission.

Appeal—Bonds—Jurisdiction.

2. *Obiter*: In the absence of anything in the record to show that an appeal bond had been filed or waived in writing, the supreme court is without jurisdiction to hear the appeal.

ON MOTION FOR REHEARING.

Mines—Master and Servant—Personal Injuries—Instructions.

3. An instruction given in an action for damages for personal injuries claimed to have been sustained by plaintiff, a miner, in falling from an unattached ladder leading into a mine,—which charged the jury that if the injury arose out of the “obvious and ordinary” risks and dangers assumed by plaintiff in entering defendant’s employment, recovery could not be had,—was proper, even though defendant’s answer did not aver that the risks were ordinary ones, but where evidence had been introduced in its behalf, without objection, to support such theory and where the whole case had been tried on this theory of the defense.

Mines—Master and Servant—Personal Injuries—Instructions.

4. An instruction submitted to the jury in a personal injury case that plaintiff, a miner, injured while descending into a mine on an unattached ladder, was bound to ascertain whether the ladder was loose or not, and that “his duty would not permit him to blindly venture upon it without investigation,” is not open to the objection that it

virtually made it the duty of the employee to act as an inspector, or investigator of appliances in the mine, since it simply announced that it was his duty to use ordinary care—common sense—to see or feel where and how the ladder was before venturing upon it.

Mines—Master and Servant—Personal Injuries—Ordinary Care—Question for Jury.

5. The question whether a miner, injured while descending into a mine on an unattached ladder, used ordinary care in failing to satisfy himself where and how the ladder was, was one for the jury to determine.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by William Thomas against the Boston and Montana Consolidated Copper and Silver Mining Company. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Mr. John A. Shelton, for Appellant.

Instruction No. 11 failed to state that the plaintiff had a right to rely upon the assumption that the master had discharged his duty in using reasonable care to provide reasonably safe appliances and a reasonably safe place to work. This omission was not supplied by any other instruction. (*Ambrose v. Angus*, 61 Ill. App. 304.) "The defense of assumption of risks or waiver must be specially pleaded if the employer wishes to rely thereon. Being affirmative in its character, it cannot be proved under the general denial." (2 Labatt on Master and Servant, sec. 864. See, also, *Oregon etc. Ry. Co. v. Tracy*, 66 Fed. 931, 14 C. C. A. 199; *Mayes v. Chicago etc. Ry. Co.*, 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Wells v. Burlington etc. R. R. Co.*, 56 Iowa, 520, 9 N. W. 364; *Nicolaus v. Chicago etc. Ry. Co.*, 90 Iowa, 85, 57 N. W. 694; *McMullan v. Missouri etc. Ry. Co.*, 60 Mo. App. 231; *Mace v. Boedker & Co.*, 127 Iowa, 721, 104 N. W. 475.)

Instruction No. 18 in effect told the jury that the plaintiff had no right to assume that the defendant had done its duty in this respect, but that the duty was upon the plaintiff to investigate and to ascertain whether or not such duty had been done; and

that if he failed to so investigate, he could not recover. Such instruction was entirely erroneous.

The plaintiff himself had said that he did not investigate. He did not know that the ladder was loose, because he had never before been in a place where he could observe its condition. It was dark at the place where this ladder was. He could only observe by such light as his candle afforded. The ladder in question was about six feet in length, resting without fastening or blocks upon two pieces of lagging. The top rested loosely against a support.

The plaintiff was directed to descend by this ladder to a place at a greater depth in the mine. He tested the ladder by putting one foot upon the same and allowing a part of his weight to rest upon the ladder; it appeared to be secure, when he brought all of his weight on the ladder and it fell.

While charged with knowledge of patent defects, and with the usual effect of wear upon the machinery, the employee is never charged by his mere duty of using it with the further duty of inspection for latent defects. (*Missouri Pacific Ry. Co. v. Crenshaw*, 71 Tex. 340, 9 S. W. 262; *Greenleaf v. Dubuque etc. Ry. Co.*, 33 Iowa, 52; *Fordyce v. Edwards*, 60 Ark. 438, 30 S. W. 758; *Barnatt v. Schlapka*, 208 Ill. 426, 70 N. E. 343; *Rock Island Sash etc. Works v. Pohlman*, 210 Ill. 133, 71 N. E. 428.)

Messrs. Forbis & Evans, Mr. J. L. Wines, and Mr. John E. Corette, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

On appeal from an order denying appellant's motion for a new trial and from the judgment. This is a personal injury case. The jury found for the defendant, and judgment was entered accordingly.

There are four specifications of error, to-wit, that the court erred in giving each of four instructions to the jury. We have examined these instructions, and find that they are correct state-

ments of the law. Appellant contends that the court omitted from them certain propositions of law favorable to him. If this be so, the appellant may not complain, as he did not request the court so to charge the jury. The order and judgment must be affirmed.

Obiter: There is not anything in the record to show that an appeal bond was made or filed, or waived in writing, and it is doubtful whether we should consider the appeal at all, as without a bond made or filed, or waived as provided by law, "the appeal is ineffectual for any purpose." (Code Civ. Proc., sec. 1724.) This point, however, was not made in the brief.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

ON MOTION FOR REHEARING.

MR. JUSTICE MILBURN delivered the opinion of the court.

The remarks of counsel for appellant as to the filing of an appeal bond need not be considered by us, as reference to the original opinion, *ante*, will show that all that is said therein was *obiter dictum* and expressly stated so to be.

Counsel complains that except as to the matter of the appeal bond "all questions presented by this appeal were * * * overlooked by such decision." The brief of appellant sets out only four specifications of error; that is to say, he declares that the court erred in giving certain instructions, four in number. The opinion shows plainly that we decided the question of the correctness of these instructions.

Instruction No. 11 is as follows: "You are further instructed that in entering into the employment of the defendant, the said William Thomas assumed all the obvious and ordinary risks or dangers incident to and arising out of the said employment, and the character of the work upon which he was engaged; and that if the injury which he received arose out of such obvious

risks and dangers, then the defendant cannot be held liable therefor." "Obvious and ordinary risks" are distinguishable from the obvious and the ordinary risks. The quoted phrase means obvious ordinary risks, and plaintiff should not complain because the court did not go further and say that he assumed also ordinary risks which were not obvious.

It is true that the defendant did not in its answer aver that the risk was an ordinary one, but there was evidence introduced, without objection, to support such theory; and the case having been tried upon this theory of the defense, the instruction was not improper.

Instruction No. 18 is as follows: "The law required William Thomas to use his natural faculties. Whatever he might have seen or discovered, exercising reasonable and ordinary care, he is supposed to have known. If he had an opportunity to ascertain whether the ladder was loose or not, his duty would not permit him to blindly venture upon it, without investigation. He is required to use his ordinary senses in places of danger, such as ascending or descending through openings, and if he failed to do so, and was injured on account thereof, he cannot recover, although the defendant company may have been negligent in not properly securing the ladder."

Counsel finds fault with the sentence "his duty would not permit him to blindly venture upon it without investigation." The appellant was about to go upon an unattached ladder down a dark place in a mine. It seems to us that the sentence was only another way of saying that he ought to have used ordinary care—common sense—to see or feel where the ladder was and how it was. The court was talking about a ladder at a particular place and at a certain moment of time. The instruction cannot properly be said to mean that it is the duty of an employee, in the exercise of ordinary care, to make himself an inspector or investigator of appliances in a mine. It was for the jury to say whether he used ordinary care if he failed, under the circumstances named, to satisfy himself where the ladder was.

We do not think that any of the instructions contained error prejudicial to the appellant under the peculiar circumstances of this case. The motion is denied.

Denied.

MR. ASSOCIATE JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY: I concur in the result, but do not desire to be understood as approving instruction 18 as proper to be given in any case. Under the circumstances of this case I do not think it prejudicial.

McCAULEY, APPELLANT, v. JONES, RESPONDENT.

(No. 2,287.)

(Submitted June 11, 1906. Decided July 6, 1906.)

Ejectment—Mortgages—Foreclosure—Sheriff's Deeds—Validity.

Mortgages—Foreclosure—Sheriff's Deed to Purchaser—Validity.

1. A purchaser at foreclosure sale went into possession after the expiration of the year within which the mortgagor was entitled to redeem. Nearly four years afterward the then sheriff, as successor of the sheriff making the sale, at the request of the purchaser executed to him a deed. The mortgagor made no offer at any time to redeem. *Held*, that the deed was applied for within a reasonable time, and was valid, within Code of Civil Procedure, section 1237, authorizing the sheriff, as successor in office of the sheriff making a foreclosure sale, to execute a deed to the purchaser.

Ejectment—Defenses—Acquisition of Title *Pendente Lite*—Effect.

2. A recovery by plaintiff in ejectment may be defeated by defendant showing title in himself acquired subsequent to the commencement of the action.

Officers—Sheriffs—Successors.

3. Any sheriff succeeding his predecessor, whether immediately or not, is the latter's "successor" within the meaning of that term as used in section 1237 of the Code of Civil Procedure.

Appeal from District Court, Silver Bow County; George M. Bourquin, Judge.

ACTION by Jefferson McCauley against David Jones. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Messrs. Maury & HogevoU, for Appellant.

The first deed was void—it was prematurely issued and delivered. If the sheriff could deliver the deed one hour before the year expired, he could deliver it six months or the day after his sale, or coincidentally with his certificate of sale. (*Perham v. Kuper*, 61 Cal. 331; *Hall v. Yoell*, 45 Cal. 584; *Moore v. Martin*, 38 Cal. 428; *Bernal v. Gleim*, 33 Cal. 668; *Gross v. Fowler*, 21 Cal. 392; *Gorham v. Wing*, 10 Mich. 486; *Dortch v. Robinson*, 31 Ark. 296.)

Regan was sheriff in office on Tuesday, March 25, 1901. On that day Clark was entitled to his deed and could have had it doubtless on request. At common law, regardless of statute, even if Regan's term of office had expired, he was the only officer (ministerial) empowered to make it (unless the court appoint a master or commissioner). (*Anthony v. Wessel*, 9 Cal. 103; *People v. Boring*, 8 Cal. 406, 68 Am. Dec. 331; *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911; *Thornton v. Boyd*, 25 Miss. 598; *In re Guenzler*, 70 Mo. 39; *Sickles v. Hogeboon*, 10 Wend. (N. Y.) 562.) Therefore the deed from Quinn was as worthless as the deed of any other stranger would have been, unless we find some statutory authority.

Mr. C. F. Kelley, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

Appeal from the judgment. The plaintiff sued the defendant in ejectment. The complaint is an ordinary one in ejectment. From the answer and replication it appears that the plaintiff was at one time the owner of certain real estate, and on September 21, 1895, made a mortgage to Henry Knippenberg to secure a loan. The mortgage and notes were assigned to William D. Clark and upon default, the sheriff of the county, on the twenty-fourth day of March, 1900, sold the property at sheriff's sale under the mortgage to Clark, the sheriff, being one Regan. On March 25, 1901,

the previous day being Sunday, sheriff Regan executed and delivered to Clark a deed for the property described, the usual certificate of sale having been made, delivered and properly filed at the time of the sale. On January 19, 1905, a new deed was made by the then sheriff, John J. Quinn, to Clark. At the time of the delivery of the first sheriff's deed Clark went into possession of the property and afterward conveyed to respondent. The district court of Silver Bow county, Honorable George M. Bourquin, judge, gave judgment in favor of the defendant.

Seven questions are raised in the brief of the appellant. The only one necessary to be considered is whether or not the Quinn deed conveyed title to the grantee therein. If the Regan deed was void on account of having been made on Monday after the Sunday which was the last day of the year of redemption, then we should consider the case as if no deed had been made at all on the Monday. The year of redemption is for the benefit of the debtor in the mortgage suit. The purchaser went into possession after the expiration of the year of redemption. It does not appear that at any time before the second deed was executed there was any offer to redeem, even if such an offer could have availed the mortgagor after the expiration of the period of redemption. The law does not require the purchaser at a mortgage foreclosure sale to apply for the deed immediately upon the expiration of the year.

The defendant in this case applied for the second deed from the sheriff within a reasonable time, and in our opinion the deed was valid. (17 Cyc. 1743.) A recovery by plaintiff in ejectment may be defeated by defendant showing title in himself, and this is so although he acquire the same subsequent to the commencement of the action. (15 Cyc. 62.) This action was commenced on September 12, 1904, and the second deed from the sheriff was made and delivered *pendente lite*. Under section 1237 of the Code of Civil Procedure it is the duty of the sheriff who made the sale, if he still be in office, but if not, then of his successor, to

make the deed. Any sheriff succeeding the sheriff who made the first deed was the successor of such officer.

We find no error in the decision of the court below.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
OCTOBER TERM, 1906.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

STATE, APPELLANT, *v.* AETNA BANKING AND TRUST CO.,
RESPONDENT.

(No. 2,319.)

(Submitted October 4, 1906. Decided October 22, 1906.)

Banks and Banking—State Examiner—Statutes—Constitution.

Banks—State Examiner—Penal Statutes—Construction.

1. Chapter C, Laws of 1903, page 184, relating to the state examiner and providing penalties for failure of banks, investment companies, etc., to comply with its requirements, must be strictly construed.

Foreign Banking Companies—State Examiner—Statutory Construction.

2. *Held*, that foreign banking corporations doing business in this state were not intended by the legislature to be included within the provisions of section 497 of the Political Code, as amended by Act of 1903 (Laws 1903, Chap. C, p. 184), which creates the state examiner's fund and imposes upon "each bank, banking corporation, savings bank, investment and loan company, incorporated under the laws of this state" the duty of paying into this fund certain fees; and that, therefore, such a concern is not subject to the penalties prescribed in section 498 for a noncompliance with the provisions of section 497.

Appeal—Constitutional Questions—Determination.

3. The constitutionality of a statute will not be inquired into by the supreme court, if an inquiry into that question is not necessary to a decision of the particular case before it.

Foreign Banking Companies—State Examiner—Statutory Construction—Elimination—Result.

4. The proviso in section 15 of the Act of 1905 (Laws 1905, Chap. 104, p. 232),—which Act regulates, among others, foreign banking corporations doing business in the state,—to the effect that the legislation shall not apply to any such concerns doing business in the state openly and lawfully at a fixed place at the time of its approval, may not be eliminated, if invalid, so as to permit the remainder of the Act to stand, since it is not apparent that the proviso was not an inducement to the legislature in passing the Act, and, by elimination of the proviso by judicial construction, such a corporation would be made amenable to the penalties provided by the Act, contrary to the desire of the legislature at the time of its passage.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by the state against the Aetna Banking and Trust Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Appellant.

Mr. Wm. T. Pigott, and Mr. J. L. Wines, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The state of Montana and the Aetna Banking and Trust Company, acting under the provisions of section 2050 of the Code of Civil Procedure, submitted to the district court a case containing an agreed statement of the facts upon which the controversy then existing between them depended. The court found for the Aetna Banking and Trust Company, and judgment was entered accordingly. From that judgment the state appeals.

The agreed statement of facts discloses that since 1901 the Aetna Banking and Trust Company has been a foreign corporation engaged in a banking business at a known and fixed

place of business in Butte, Montana, with a capital stock of \$100,000. It has at all times fully complied with the laws prescribing the conditions under which foreign corporations may do business in this state. (Laws 1901, p. 150.) During the year ending November 1, 1904, the state examiner demanded from this respondent that it furnish certain reports ordered by him, that it permit him to examine and investigate its affairs, and that it pay into the state examiner's fund the sum of \$100. Every one of these demands was refused. Like demands were made during the year ending November 1, 1905, with the same result; and these refusals gave rise to this controversy.

The state contends (1) that it is entitled to collect the penalties mentioned in section 498, Chapter C, page 188, Laws of 1903, on account of the refusal of this respondent to comply with the demands made in 1904; (2) that it may recover the penalties provided by Chapter 104, page 232, Laws of 1905, on account of the failure of the respondent to comply with the demands made in 1905.

1. Chapter C, Laws of 1903, is entitled "An Act to amend an Act approved March 4, 1897, entitled 'An Act to amend Sections 490 and 506 inclusive, being all of Article 11, Chapter 3, Title 1, Part 3, Political Code of Montana, providing for the Appointment of a State Examiner and defining his Duties and Powers.'" Section 491 of the Chapter defines the duties of the state examiner, and certain penalties are provided for offenses committed by officers or agents of the concerns mentioned; but these provisions have no application here where the corporation itself is a party to a civil action. This is not a criminal prosecution against the officers of this respondent. The Chapter also fixes the salary of the state examiner and his deputy, and then, in section 497, creates the "State Examiner's Fund," and provides for the payment into this fund of certain amounts from the counties of the state, according to classification, also for the payment into this fund by "each bank, banking corporation, savings bank, investment and loan company, incorporated under the laws of this state," of certain

fees according to the capital stock of the concern. A concern with a capital stock of \$100,000 is required to pay \$100. Each building and loan association, whether foreign or domestic, doing business in this state, is required to pay into this fund one-twentieth of one per cent of its assets as shown by its last annual statement. Section 497 then provides: "Any excess of the expenses of such examination incurred in pursuance of this title over and above the fee herein provided for shall be paid by the state from any money in the general fund not otherwise appropriated."

Section 498 of the Chapter provides: "Any banks, banking corporation, saving bank, building and loan association, investment and loan company, incorporated under the laws of this state or doing business under any law of this state concerning corporations, that shall fail or neglect to pay the state treasury within ten days after the first day of November each year the sum due as specified in the section next preceding shall forfeit to the state ten dollars (\$10.00) for every day it shall so fail," etc.

In order for the state to prevail as to its first contention, it must show that this respondent is liable to pay the fee mentioned in section 497 above. This respondent is a corporation organized under the laws of the state of West Virginia and doing business in Montana. It is conceded that section 497 above does not in terms apply to such a concern. That section only mentions banks, banking corporations, etc., *incorporated under the laws of this state*, and foreign and domestic building and loan associations. But the attorney general insists that the phrase "or doing business under any law of this state concerning corporations" found in section 498, should be read into section 497, immediately after the phrase "incorporated under the laws of this state," and, if this be done, then the right of the state to prevail as to its first contention is clear.

We need not consider what rule of statutory construction applies to statutes not penal in character. Chapter C of the Laws of 1903 is a highly penal statute, and the rule, universally rec-

ognized, is that a statute of this character must be strictly construed. The rule is founded upon the principle that the power of punishment vests in the legislature, not in the courts. "Strict construction, as applied to statutes, means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace cases or acts not clearly described by such words, and to bring them within the prohibition or penalty of such statutes. It does not mean that words shall be so restricted as not to have their full meaning, but that everything shall be excluded from the operation of statutes so construed which does not clearly come within the meaning of the language used." (26 Am. & Eng. Ency. of Law, 657.)

It is not sufficient to say that there is no good reason for the omission from section 497 above of the phrase we are now asked to supply. "Where the language of a statute is clear, it is not for the court to say that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions." (26 Am. & Eng. Ency. of Law, 601.) "It is, however, the object of the construction of penal as of all other statutes to ascertain the true legislative intent; and while the courts will not, on the one hand, apply such statutes to cases which are not within the obvious meaning of the language employed by the legislature, even though they be within the mischief intended to be remedied, they will not, on the other hand, apply the rule of strict construction with such technicality as to defeat the purpose of ascertaining the true meaning and intent of the statute." (26 Am. & Eng. Ency. of Law, 659.) If the intention of the legislature is made manifest by the language employed in the Act, then there is no occasion for resorting to rules of construction or interpretation. If the language is plain, it will be construed as it reads and the words employed given their full meaning.

In order to determine, if possible, just what institutions the legislature intended to burden with the fees mentioned in sec-

tion 497 above, resort may profitably be had to the history of the legislation upon the subject. The first statute dealing with the subject of bank examination was reported by the Code commission, and adopted as a part of the Political Code (sections 490-496). Provision was made for the appointment of a state examiner, his salary fixed, and his duties defined. But no fees were required to be paid by the concerns examined by him, and there is not any reference in the Act to foreign banking corporations doing business in the state or to foreign or domestic building and loan associations. Apparently the purpose in the beginning was to subject to the supervision of the state examiner only domestic corporations and private persons doing a banking and loaning business. This statute was immediately superseded by the Act of March 18, 1895 (Political Code, sections 497-506). By section 498 of this Act the duties of the state examiner are defined to be, among other things, "to visit each year, without previous notice, each of the banks, banking corporations and saving banks, investment and loan companies, incorporated under the laws of this state, or doing business under any law of the state concerning corporations, and to examine into their affairs," etc. Foreign banking institutions doing business in this state were then, for the first time, made subject to the supervision of the state examiner.

By section 504 of the Act above, there was created the "State Examiner's Fund," and the state sought to provide for the expenses of the state examiner's office by requiring every county to pay an amount based upon the classification of the counties, and "each bank, banking corporation, savings bank, investment or loan company *incorporated under the laws of this state*" was required to pay the sum of \$50, and the balance of the expenses incurred was to be paid by the state from the general fund. In order to secure the payment of the amounts apportioned among the banking institutions mentioned, there was a penalty clause added in section 505 of the Act as follows: "Any bank, banking corporation, savings bank, investment or loan company, *incorporated under the laws of this state, that*

shall fail or neglect to pay into the state treasury within ten days from and after the first day of January of each year the sum mentioned in the section next preceding shall forfeit to the state ten dollars for every day it shall so fail and neglect," etc. It is worthy of note that, while foreign as well as domestic banking institutions were made subject to the supervision of the state examiner by this Act, foreign banking institutions were not required to pay any fee into the state examiner's fund, and were not subject to the penalty clause of the Act; and this is so, notwithstanding the Act declares in section 504 that the purpose of creating the state examiner's fund was "the just distribution of the expenses incurred in pursuance of this title." Mention is not made in this Act of either foreign or domestic building and loan associations.

Notwithstanding the Code provisions had been superseded by the Act of March 18, 1895, all of the provisions of Article XI, Chapter III, Title I, Part III, Political Code, embracing sections 490-506, were repealed by an Act of March 4, 1897 (Laws 1897, p. 105), and in lieu of the provisions found in the Code there was substituted the Act of 1897 above, containing sections numbered 490-499; but, so far as this case is concerned, no material difference is found between the Act of 1895 and the Act of 1897. The duties of the state examiner were enlarged somewhat and the amounts required to be paid into the state examiner's fund by the several counties changed to a certain extent. Building and loan associations, both foreign and domestic, were brought under the supervision of the state examiner by the provisions of Senate Bill 64 (Laws 1897, p. 231); and by the provisions of section 497 (page 107) of this Act of 1897 these associations are required to contribute to the state examiner's fund. However, in the penalty clause to the Act, no provision is made for enforcing the contributions from foreign building and loan associations. They are required to contribute to the fund, but only "banks, banking corporations, savings banks, building and loan associations, investment or loan company *incorporated under the laws of this state*" are

made subject to the penalty, which is provided in section 498 of the Act. While from March 18, 1895, foreign banking institutions doing business in this state were subject to supervision by the state examiner, certainly no one would contend that prior to 1903 at least they were required to contribute to the state examiner's fund, or were subject to the penalties prescribed for failure to pay the fees required from domestic banking concerns.

The Act of 1897 above was amended by an Act approved March 6, 1903 (Laws 1903, p. 184). This later Act apportioned the amounts to be paid into the state examiner's fund by the banking institutions mentioned according to the amount of capital stock, but again restricted the contributors to the fund to banks, banking corporations, savings banks, investment and loan companies *incorporated under the laws of this state*, and to foreign and domestic building and loan associations; and now as if to correct the oversight in the penalty clause of the Act of 1897 above, this Act contains a penalty clause sufficiently broad in its terms to compel contributions from every institution which was required to make the same, and banks, banking corporations, savings banks, building and loan associations, investment and loan companies, incorporated under the laws of this state, or doing business under any law of this state concerning corporations, are made subject to the penalties prescribed. The phrase "or doing business under any law of this state concerning corporations" is inserted in the penalty clause for the first time. But to whom does it refer? To all foreign corporations doing business under the laws of this state? By express terms its operation is limited to only such as fail or neglect to pay the sums due as specified in the section of the Act preceding the penalty clause. From whom were the sums mentioned in the preceding section due? From "each bank, banking corporation, saving bank, investment and loan company, *incorporated under the laws of this state*," and from foreign and domestic building and loan associations, and from no one else. It would seem perfectly clear, then, that the only

purpose of inserting the phrase above in the penalty clause of this Act was to enforce contributions from foreign building and loan associations which were likely to escape by reason of the absence of this phrase from the penalty clause of the Act of 1897 above.

When we consider that the legislature by the provisions of the Act of March 18, 1895, made both foreign and domestic banking institutions subject to the supervision of the state examiner, but only required domestic banking concerns to contribute to the expense of such supervision, and these provisions were considered by the legislature of 1897 and the same plan followed, foreign banking institutions being still exempt from the payment of the fees required of domestic banking concerns, and that these provisions of the law were again considered in 1903 and the same general plan retained, and the legislature, as if to emphasize its intention in the matter, declared again that contributions to the fund should be made by "each bank, banking corporation, saving bank, investment and loan company, *incorporated under the laws of this state*," and foreign and domestic building and loan associations doing business in this state, it seems impossible to reach any other conclusion than that foreign banking concerns doing business in this state were not intended to be included within the provisions of section 497 of the Act of 1903; and this respondent cannot, therefore, be held liable for the penalties mentioned in section 498 of that Act.

But the attorney general insists that the exemption of foreign banking concerns from the operation of the provisions of section 497 above renders the entire Act of 1903 void. Whether this result follows need not be determined. We have held that this respondent is not liable to pay the fee mentioned in section 497 above and therefore the state cannot maintain its first contention. If the entire Act is void, the state could not collect the fee from this respondent, so that no useful purpose would be served in determining whether or not this exemption of foreign banking concerns from the operation of the law invalidates

the entire Act; and following a rule universally recognized by courts we will not decide the constitutionality of a statute unless such decision is necessary to a determination of the case.

2. The state's second contention is that this respondent is subject to the provisions of the Act of the Ninth Legislative Assembly, approved March 7, 1905 (Chapter 104, p. 232, Laws of 1905). This Act is entitled "An Act regulating Foreign Corporations and Joint Stock Companies doing a Banking Business within the State of Montana, and prescribing Penalties and Punishments for Violations of the Provisions thereof." The purpose of this Act is to regulate foreign banking concerns doing business in this state. Their affairs are made subject to examination by the state examiner. They are required to make certain reports, and to pay certain fees into the state examiner's fund. Severe penalties are prescribed for the violation of the provisions of the Act. After defining foreign banking concerns as understood in the Act, section 15 contains this proviso: "Provided, that this Act shall not apply to any corporation which at the time of its approval may be openly and lawfully engaged in banking at a known and fixed place of business within this state."

It is conceded that this respondent was at the time of the approval of this Act a foreign banking corporation, openly and lawfully engaged in banking at a known and fixed place of business within this state. But the attorney general insists that this proviso is invalid as in direct conflict with section 11, Article XV, of the Constitution; and *Criswell v. Montana Central Ry. Co.*, 18 Mont. 167, 44 Pac. 525, 33 L. R. A. 554, is cited in support of this contention. For the purpose of this argument only, we may assume, without deciding, that this contention made by the attorney general is correct. This, then, leads to a consideration of the question: May that proviso, if invalid, be eliminated and the remainder of the Act permitted to stand in full force and effect? The result of such a holding would be to include within the provisions of the Act this respondent, which is not subject to such provisions as the Act was passed and approved.

In *Northwestern M. Life Ins. Co. v. Lewis and Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982, this court quoted with approval and designated it as an elementary rule of law, the canon of construction in a case of this character, as follows: "When the valid and invalid portions of the legislative enactment are capable of being separated, and the valid part is a complete Act, and not dependent upon that which is void, the latter alone will be rejected, and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid; but, if it is manifest from an inspection of the law itself that the invalid portion formed an inducement to its passage, the entire Act will fall." And in that case it was held that the invalid portion might be eliminated from section 681 of the Civil Code and the remaining portion of the section be operative, and this for the reason that it could not possibly be said that the invalid portion in any sense formed an inducement or compensation for the enactment into law of the provisions of the section, since the section was merely the legislative response to a constitutional mandate. But the decision in that case has no application here.

The legislature in this instance was not responding to any demand of the Constitution in enacting Chapter 104 above. May we say, then, that the legislature would have enacted the provisions of Chapter 104 without the proviso in section 15? In language too plain to be misunderstood the legislature in effect said: "We intend to form into one class foreign banking institutions which commence business after the approval of this Act, and everyone in that class shall be subject to the provisions of this Act; and we intend to form another class of foreign banking corporations, composed of those which are already in this state doing business at a known and fixed place of business at the time this Act is approved, and no one of that class shall be subject to these provisions." The legislative intention is expressed in unmistakable language, but we are asked now to eliminate the proviso from section 15 above, and thereby make all the other provisions of the Act applicable alike to both

classes. Severe penalties are prescribed for a violation of the provisions of Chapter 104. The direct and immediate effect of sustaining this contention made by the attorney general, then, is to subject this respondent and other foreign banking concerns similarly situated to the penalties prescribed by the Act, a result which the legislature particularly declares was not contemplated or desired. We certainly cannot say that it is manifest that the proviso was not an inducement to the legislature to pass the Act. We cannot substitute the judgment of the court for that of the legislature as to its policy or as to the wisdom of the legislation.

Speaking of the principle for which the attorney general now contends, the supreme court of the United States, in *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115, said: "But the insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, the supreme court of the United States announced the rule of construction applicable here as follows: "If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But, if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire Act must be held inoperative."

These decisions were cited with approval by this court in *State v. Cudahy Packing Co.*, 33 Mont. 179, 82 Pac. 833, where it is said: "Courts may not by process of interpolation or elimination make statutory provisions apply or extend to subjects not falling clearly within their terms; for, by so doing, they

would to this extent usurp the functions of the law-making department of the government.”

This court may not, then, by arbitrarily striking out the proviso from section 15, so enlarge the scope of Chapter 104 above as to make this respondent amenable to its provisions, for such a result was plainly never contemplated by the legislature. If the proviso in section 15 is invalid, the whole of Chapter 104 must fall with it. But in any event, the state cannot maintain its second contention, for this respondent by the terms of the proviso is exempt from the provisions of the Act, while, if the Act itself is invalid, it would not be called upon to contribute anything to the state examiner’s fund.

We find no error in the record. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

CLARK ET AL., APPELLANTS, v. MAHER, TREASURER, ET AL.,
RESPONDENTS.

(No. 2,311.)

(Submitted October 3, 1906. Decided October 22, 1906.)

*Taxation — Assessment — Banks — Constitution — Statutes —
Injunction.*

Taxation—Banks—Deduction of Deposits—Statutes.

1. The provisions of section 3695, subdivision 8, Political Code, providing for a deduction of deposits (debts) in the hands of private bankers for purposes of taxation, from moneys on hand and in transit, and that only deposits other than current deposits may be deducted from bills and accounts receivable and other credits, and those of section 3701, authorizing any taxpayer to deduct from his credits all debts then owing by him, which section is applicable alike to all taxpayers, whether natural persons or corporations, are in direct conflict, and therefore, under section 5165 of the same Code, the latter must prevail.

Same—Banks—Assessment—Constitution—Statutes.

2. That portion of subdivision 8 of section 3695, Political Code, granting to private bankers the right to deduct their deposits (debts) from moneys on hand, for purposes of assessment, is violative of Article XII, sections 11 and 16, providing, respectively, that taxes "shall be uniform upon the same class of subjects," and that "all property shall be assessed in the manner prescribed by law," etc.

Same—Banks—Assessment—Deduction of Deposits—Demand.

3. Where a bank had made timely demand to have its deposits (debts) deducted from its credits, for assessment purposes, it was entitled to such deduction, under Political Code, section 2701, although it mistakenly also requested a like deduction from the moneys on hand, under subdivision 8, section 3695 of the same Code.

Same—Duty of Assessor.

4. It is the duty of the assessor to make an assessment according to law, and not in accordance with what the person whose property is about to be assessed thinks the law is or ought to be.

Same—Banks—Credits.

5. Moneys due from other banks or bankers are credits within the definition of that term in section 3680 of the Political Code.

Same—Valid Assessment—Requisites.

6. A valid assessment is an indispensable prerequisite to a valid tax; and in order that an assessment may be said to be valid, there must have been a listing of persons and property, and an estimating and fixing of the value of the property.

Same—Assessment—By Whom It Must be Made.

7. An assessment may only be made by the officers charged with that duty, and cannot be made by the court.

Same—Banks—Assessment.

8. The fact that a bank had moneys on hand and in transit to the amount of \$403,869.27, subject to taxation, but which sum was not assessed under a mistaken idea of the law, did not justify the imposition of taxes upon \$1,529,940 credits, of which amount, after deduction of the bank's just debts, nothing remained liable to taxation.

Same—Banks—Assessment—Collection—Tender—Injunction.

9. Because a bank had not paid or offered to pay taxes upon moneys on hand and in transit, not assessed to it, the remedy of injunction to restrain the collection of taxes illegally levied upon other of its property, not subject to taxation, may not be denied it, since, an assessment by the proper officers being necessary to a tax and none having been made, there was nothing for it to pay or tender.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by W. A. Clark and another for injunction against James Maher, treasurer of Silver Bow county and another. From a judgment in favor of defendants, plaintiffs appeal. Reversed and remanded.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondents.

In support of the proposition that the law authorizing the deduction of debts from money, under constitutional provisions similar to those in this state, is unconstitutional, we submit the following authorities: *Pullman State Bank v. Manring*, 18 Wash. 250, 51 Pac. 465; *Treasurer v. Bank*, 47 Ohio St. 503, 25 N. E. 697, 10 L. R. A. 196; *Morris v. Jones*, 150 Ill. 542, 37 N. E. 928; *Clark v. Carter*, 40 Ind. 190; *Detroit etc. Ry. Co. v. Common Council*, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 103; *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 831; *State v. Duluth etc. Ry. Co.*, 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623, 31 S. W. 491, 29 L. R. A. 73.

Because a person who borrows one thousand dollars and gives his note for it, is subject to assessment on such thousand dollars, if still owned by him or in his possession or control on the first Monday of March, and the person to whom he gave the note is also subject to assessment on such note as a credit, is no argument against the constitutionality of the law upon the ground that the same is double taxation, for it has been said that "The power to tax twice is as ample as to tax once." (See Cooley on Taxation, 3d ed., pp. 389-394, and cases cited; *Mackay v. City and County of San Francisco*, 113 Cal. 392, 45 Pac. 698; *Goldgart v. People*, 106 Ill. 25; *People v. Worthington*, 74 Am. Dec. 95, note.)

Appellants in the case at bar did not make a proper return to the assessor even under section 3695 of the Political Code, nor comply with such law, therefore they are not entitled to deduction of debts from credits under that section; nor did they make proper return to the assessor under section 3701, nor comply with such law, for under such section they could deduct debt only from credits, while in fact, they did more than that. Not having properly returned their property to the assessor and having failed to comply with the law in claiming deductions, they are not in position to complain, if credits,

which their list as returned to the assessor shows they owned, were assessed to them. (*San Francisco v. Flood*, 64 Cal. 506, 2 Pac. 264; Cooley on Taxation, 3d ed., p. 619.)

The bank never tendered the tax on the \$403,869.27 or on any amount greater than \$72,390, and is not, therefore, in position to maintain an action in equity, and its application for injunction should be denied upon that ground alone. (*National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756; *Casey v. Wright*, 14 Mont. 315, 36 Pac. 191.)

In support of the general rule to the effect that the collection of taxes should not be enjoined for mere irregularities, such as appear in this case, and especially where the party complaining is responsible therefor, and his substantial rights not affected thereby, see *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 757; *Otoe Co. v. Brown*, 16 Neb. 394, 398, 20 N. W. 641; *Wilson v. Wheeler*, 55 Vt. 446; *Beers v. People*, 83 Ill. 488; *City of Auburn v. Y. M. C. A.*, 86 Me. 244, 29 Atl. 992; *Lewis v. Town of Eastfall*, 44 Conn. 477; *Spear v. Town of Braintree*, 24 Vt. 414; *Sprague v. Bailey*, 36 Mass. 436, 19 Pick. 436; Pol. Code, sec. 4014

So long as the list returned by the appellants shows property subject to taxation, the failure to incorporate it in detail or in technical terms on the assessment-book will not invalidate the assessment, and especially so when the appellants were not misled in the matter. (*Lewis v. Town of Eastford*, 44 Conn. 477; *City and County of San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66; *Dear v. Weineke*, 94 Cal. 322, 29 Pac. 646; Pol. Code, Div. IV, sec. 3724.)

Mr. W. M. Bickford, and *Mr. Geo. F. Shelton*, for Appellants.

Assessments made by officers or boards other than those invested with the power to make them are, as a general rule, illegal and void. (27 Am. & Eng. Ency. of Law, 699; *Powder River Cattle Co. v. Custer County*, 45 Fed. 327; *Clunie v.*

Siebe, 112 Cal. 593, 44 Pac. 1064; *Burton Stock-Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418. See, also, *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103.) "One who, by mistake of his rights, returns to the assessors as liable for taxation a list of property which by law is exempt, is not thereby estopped to claim an abatement of the tax." (*Wilmington v. Ricaud*, 90 Fed. 214, 32 C. C. A. 580.)

The court, in the absence of a constitutional provision authorizing such action, cannot increase an assessment or assess property not assessed by the assessor. (*State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Heine v. The Levee Commissioners*, 19 Wall. 660, 22 L. Ed. 226; *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72; *Monroe v. Town of New Canaan*, 43 Conn. 309; *Keokuk & H. Bridge Co. v. People*, 185 Ill. 276, 56 N. E. 1049; *Hulbert v. People*, 189 Ill. 114, 59 N. E. 567.)

Money and cash items were not assessed by the assessor, and, therefore, no tax was due thereon. An assessment was absolutely necessary, and without it the whole proceeding was void. (1 Cooley on Taxation, 596, 597, above quoted; *Birney v. Warren*, 28 Mont. 68, 72 Pac. 293; *Lake County v. Mining Co.*, 66 Cal. 17, 4 Pac. 876; *People v. Weaver*, 100 U. S. 545, 25 L. Ed. 707; *Commonwealth v. Lehigh etc. Nav. Co.*, 104 Pa. St. 89.)

To render an assessment list legal and valid, every article therein specified must appear on the face of such list to be legally subject to taxation. (*Adam v. Litchfield*, 10 Conn. 126; *Whittlesey v. Clinton*, 14 Conn. 75; 1 Desty on Taxation, 564; *Green v. Craft*, 28 Miss. 70; *Kelsey v. Abbott*, 13 Cal. 609; *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521; 1 Cooley on Taxation, 596, 597.)

A tax lien is entirely the creature of statute. The lien does not arise by implication from the power to tax, but must be given by the statute, and cannot be extended by implication. This is expressly held by this court in the case of *Walsh v. Croft*, 27 Mont. 407, 71 Pac. 409. The obligation to assess property creates no lien. This was laid down, not only in the case of *Heine v. Levee Commissioners*, *supra*, but also in the case of

Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72, and in the case of *Watson v. Major*, 10 Colo. App. 185, 50 Pac. 744. (See, also, 27 Am. & Eng. Ency. of Law, 636, 637; *North Carolina R. R. Co. v. Commissioners*, 77 N. C. 4; *Ferris v. Coover*, 10 Cal. 589; *People v. Hastings*, 29 Cal. 450, 452; *People v. Pearis*, 37 Cal. 259, 262; *Worthington v. Whitman*, 67 Iowa, 190, 25 N. W. 124; *McCready v. Sexton & Son*, 29 Iowa, 356, 4 Am. Rep. 214; *In re Douglas*, 41 La. Ann. 765, 6 South. 675; *Abbott v. Lindembower*, 42 Mo. 162; *Powers v. Fuller*, 30 Iowa, 476; *Robinson v. First Nat. Bank*, 48 Iowa, 354.)

The rule is that laws for the assessment and collection of revenue should be construed with reasonable strictness. (*Noll v. Morgan*, 82 Mo. App. 119; *St. Louis etc. Ry. Co. v. Epperson*, 97 Mo. 300, 10 S. W. 480; *Kansas City v. Hannibal etc. Ry. Co.*, 81 Mo. 285, 293; *Campbell County Court v. Taylor*, 8 Bush (Ky.), 206, 208; *Beckwith v. English*, 51 Ill. 147.)

The constitutionality of laws permitting the deduction of debts from credits is fully sustained by the authorities. (*Macklot v. City of Davenport*, 17 Iowa, 379; *Bells Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 21 Sup. Ct. 863, 45 L. Ed. 1227; *Newport v. Mudgett*, 18 Wash. 271, 51 Pac. 466; *People ex rel. Bijur v. Barker*, 155 N. Y. 330, 49 N. E. 940.)

The relation of banker and depositor is that of debtor and creditor. Therefore all deposits were debts, and should have been deducted from the credits in order to ascertain the just amount and value thereof for the purposes of taxation. (*Bank v. Millard*, 10 Wall. 152, 19 L. Ed. 897; *Foley v. Hill*, 2 H. L. Cas. 28; *Williams v. Rogers*, 14 Bush, 788; *Pyle v. Brenneman*, 122 Fed. 787; *Griffin v. Heard*, 78 Tex. 607, 14 S. W. 892; *People v. Dederick*, 161 N. Y. 195, 55 N. E. 927.)

If the construction placed upon section 3695 of the Political Code by the assessor were correct, it would violate the constitutional guaranty that taxes shall be uniform upon the same class of subjects.

It has been held by the courts that state statutes which allow taxpayers to deduct the amount of their debts from the valuation of their moneyed capital held by them, must grant the same privilege to holders of national bank shares, in order to avoid conflict with section 5219 of the United States Revised Statutes. A failure to accord to holders of national bank shares equal privileges in this regard constitutes the discrimination inhibited by that statute. (*People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *National Albany Exchange Bank v. Wells*, 18 Blatchf. 478, 5 Fed. 248; *Richards v. Rock Rapids*, 31 Fed. 505; *First Nat. Bank v. Richmond*, 39 Fed. 309; *Whitney Nat. Bank v. Parker*, 41 Fed. 402; *Mercantile Nat. Bank v. Shields*, 59 Fed. 952; *City Nat. Bank v. Paducah*, 2 Flipp. 61, Fed. Cas. No. 2743; *Evansville Nat. Bank v. Britton*, 10 Biss. 503, 8 Fed. 867; *Wasson v. First Nat. Bank*, 107 Ind. 206, 8 N. E. 97; *National Bank v. Fisher*, 45 Kan. 726, 26 Pac. 482; *McAden v. Board of Commrs.*, 97 N. C. 355, 2 S. E. 670; *Ruggles v. Fond du Lac*, 53 Wis. 436, 10 N. W. 565; *Weston v. Manchester*, 62 N. H. 574; *People v. National Bank*, 123 Cal. 53, 69 Am. St. Rep. 50, 55 Pac. 685, 55 L. R. A. 747.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Between the first Monday in March, 1904, and the 1st of July following, the assessor of Silver Bow county required from W. A. Clark & Brother, copartners engaged in business as private bankers, in Silver Bow county, a statement showing all their real and personal property subject to taxes for that year. They returned the list of property which showed real estate of the value of \$127,610, which valuation was subsequently raised by the board of equalization to \$132,610, and personal property listed substantially as follows:

Moneys on hand or in transit, \$403,869.27;

Due from other banks, bankers, etc., subject to draft, \$1,203,059.47;

Bills and accounts receivable and other credits, \$1,657,533.52;
Deposits made by other persons, \$3,686,397.89.

They asked that the amount of debts (deposits) be deducted from the aggregate amount of moneys and credits, including money due from other banks, bankers, etc., and stated that the list was furnished pursuant to section 3695 of the Political Code. On July 9th following, Clark & Brother received from the assessor a copy of the list so furnished by them, with a statement by the assessor attached thereto, that under the law the only deductions which could be made from bills and accounts receivable are accounts payable other than current deposits, and, as no such accounts had been returned, he, the assessor, had assessed to them the amount of bills and accounts receivable, \$1,657,550, less the value of real estate returned, \$127,610, leaving the net value of personal property assessed to them, \$1,529,940. Application was made to the board of equalization for relief, which was denied.

The taxes levied upon the real estate were paid before November 30, 1904; but the taxes levied upon the solvent credits, \$1,529,940, were not paid, and, on December 19, 1904, the county treasurer published the delinquent tax list, including therein this item: "Clark, W. A. & Bro., Bankers—North 22¼ feet, lot 1, block 29, Butte Townsite, sold for taxes on solvent credits, including deposits in bank, \$27,937.20." To this delinquent tax list was attached the usual notice by the treasurer that, unless the taxes were paid, the real estate upon which such taxes were a lien would be sold to satisfy the same on January 9, 1905. Prior to the last date this action was commenced.

An amended complaint was filed setting forth the facts herein mentioned and asking that the county treasurer be restrained from selling the real estate mentioned above. To this amended complaint the defendant county treasurer interposed a general demurrer, which was sustained by the court, and, the plaintiffs having elected to stand on their amended complaint, judgment was entered in favor of the defendant, from which judgment the plaintiffs appealed.

Apparently W. A. Clark & Brother, in returning their list to the assessor, proceeded upon the theory that they could deduct their debts from moneys on hand under those provisions of subdivision 8, section 3695, above, allowing such deduction to be made, and the remainder of their debts they could deduct from their solvent credits under the provisions of section 3701 of the same Code, and thereby eliminate for the purpose of assessment all their personal property. The assessor and board of equalization apparently proceeded upon the theory that those provisions of subdivision 8, section 3695 above, only, were applicable to appellants' case, and, therefore, their solvent credits were liable for taxation without allowing any deduction for debts due by them. In this court, however, appellants practically concede that the provisions of section 3701 only are applicable to this case.

This action was commenced prior to the enactment of the amendment to section 3695. (Session Laws 1905, p. 54, Chap. XXV.) It is to be observed that there is a direct conflict between the provisions of section 3701, above, and that portion of subdivision 8 of section 3695, which provides for a deduction of debts (deposits) from money on hand and in transit, and which further provides that only deposits other than current deposits may be deducted from bills and accounts receivable and other credits. Section 3701 authorizes any taxpayer to deduct or have deducted from his credits all debts then owing by him; but this section does not authorize the deduction of debts from money on hand, and, if it attempted to do so, would clearly violate the provisions of the Constitution.

In *Daly Bank & Trust Co. v. Board of Commissioners*, 33 Mont. 101, 81 Pac. 950, this court held that the provisions of section 3701 are general and applicable alike to all taxpayers, whether natural persons or corporations, and we see no reason for receding from that position now. This being so, and the provisions of section 3701 conflicting directly with those of subdivision 8 of section 3695 above, the provisions of section 3701 prevail, for there is not anything in such a construction

inconsistent with the meaning of the Chapter in which both sections are found. This is the rule of construction provided by section 5165 of the Political Code which reads: "If conflicting provisions are found in different sections of the same chapter or article, the provisions of the section last in numerical order must prevail, unless such construction is inconsistent with the meaning of such Chapter or Article."

Furthermore, the attempt of the legislature to authorize private bankers to deduct their debts from moneys on hand is abortive. That portion of subdivision 8 of section 3695 above referred to is in direct contravention of sections 11 and 16, Article XII, of the Constitution of Montana.

These appellants, having made timely demand, were entitled to have their debts deducted from their credits (*Daly Bank & Trust Co. v. Board of Commissioners*, above), and this notwithstanding they mistakenly thought they could also deduct such debts from moneys on hand. The assessor could not have been misled by any statement of appellants attached to their list of property, respecting the particular provisions of the Code under which they assumed that their assessment would be made. The assessor's duty was to make the assessment according to law, not according to what appellants may have thought the law was or ought to be.

But it is said that, adding together the amounts of the moneys on hand and in transit and the amounts due from other banks, bankers, etc., practically the same amount (though larger) is obtained as that upon which the assessment was made; and, as appellants did not pay the taxes on the greater amount they cannot complain that they are required to pay on the lesser amount. But such an argument, while it may have some foundation in morals, has none in law. In the first place, moneys due from other banks and bankers are credits within the definition of that term as given by section 3680 of the Political Code. In the second place, to say that, because one species of property which a man does own is not assessed, he may be made to pay taxes on property which he does not own, or on property

which he does own but which is not liable for taxation, violates almost every principle of the law of taxation.

According to the return made to the assessor by these appellants, their property liable to taxation consisted of their real estate, and of moneys on hand and in transit, amounting to \$403,869.27. The appellants could not assess their own property. They were only called upon to furnish a list of the items. It was the duty of the assessor to make the assessment, and, if he failed to do so in a proper manner, these appellants cannot be held to be to blame.

Appellants having paid the taxes levied upon their real estate directly, such real estate could only be sold to satisfy the lien of a tax levied upon their personal property, and such a lien could only be created by a valid tax. As an indispensable prerequisite to a valid tax there must have been a valid assessment of such personal property. (*Northern Pac. R. R. Co. v. Carland*, 5 Mont. at p. 171, 3 Pac. 146; *Board of Commissioners v. Anderson*, 68 Fed. 341, 15 C. C. A. 471 (Montana case); *Worthington v. Whitman*, 67 Iowa, 190, 25 N. W. 124; *People v. Hastings*, 29 Cal. 450; 27 Ency. of Law, 2d ed., 660.) At least two steps are necessary to be taken to make a valid assessment: First, listing the persons and property; and, second, estimating and fixing the value of the property. (*State ex rel. Butte v. Johnson*, 16 Mont. 570, 41 Pac. 706; *People v. Weaver*, 100 U. S. at p. 545, 25 L. Ed. 705.) And this assessment must be made by the proper officers, and cannot be made by the court. (*Danforth v. Livingston*, 23 Mont. 558, 59 Pac. 916; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Hulbert v. People*, 189 Ill. 114, 59 N. E. 567; *Monroe v. Town of New Canaan*, 43 Conn. 309; 2 Cooley on Taxation, 912.)

The cash on hand belonging to these appellants and which was liable for taxation was not assessed at all; on the contrary, this amount was completely wiped out by deducting debts of an equal amount from it, while appellants were assessed with \$1,529,940, represented by solvent credits. But from the amount of these credits appellants were entitled to have de-

ducted their just debts represented by the current deposits; and had this deduction been made there would not have been anything left of their credits subject to taxation.

The fact that appellants had more than \$400,000 worth of property liable to taxation and with which they ought to have been assessed, but were not, does not justify the imposition of taxes upon \$1,500,000 of property which they had, but which was not liable to taxation under the circumstances presented by this case.

Some contention is made that appellants are not entitled to an injunction upon the showing made in their amended complaint. The maxim, "He who seeks equity must do equity," is quoted by respondents. It is said to be applicable here for the reason that appellants have not paid or offered to pay the taxes upon the \$403,869.27, moneys on hand and in transit. But, as we have said before, this amount was not assessed to them, and, an assessment being necessary to a tax, there were not any taxes due from appellants on that property, and, therefore, nothing for them to pay or tender. And they cannot be charged with being remiss in failing to pay or tender an amount not due or payable at the time this action was commenced.

The tax levied upon the amount of credits without any deduction having been allowed for debts was void, and, under the authority of *Montana Ore Pur. Co. v. Maher*, 32 Mont. 480, 81 Pac. 13, and *Hensley v. City of Butte*, 33 Mont. 206, 83 Pac. 481, injunction was a remedy available to these appellants.

Under the view we have taken it is not necessary to consider the question whether the delinquent tax list, in so far as it applied to property of these appellants, was sufficiently explicit to warrant the sale contemplated if no other objection had been made. The complaint states facts sufficient to constitute a cause of action in favor of appellants.

The judgment is reversed, and the cause is remanded to the district court, with directions to overrule the demurrer.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

STATE, RESPONDENT, v. ALLEN, APPELLANT.

(No. 2,324.)

(Submitted October 4, 1906. Decided October 22, 1906.)

*Criminal Law—Grand Larceny—Information—Evidence—
Instructions—Circumstantial Evidence—Conspiracy.*

34	403
35	369
35	375
36	112

34	403
e37	201

34	403
41	562

Grand Larceny—Information—Requisites—Felonious Intent.

1. An information charging the defendant with grand larceny, in that he "willfully, unlawfully and feloniously, and with the intent then and there to steal, did take, steal, carry and drive away" a certain mare and colt, is not open to the objection that it fails to allege that the taking was done with felonious intent,—since the term "feloniously" imports criminal intent,—but is sufficient both under the common law and under Penal Code, section 880, as amended by Session Laws of 1897, page 247.

Same—Conspiracy—Evidence—Declarations.

2. While the acts and declarations of a co-conspirator done and made in furtherance of a common design are admissible against all the other parties to the conspiracy, whether done or made in their presence or with their knowledge or not, they must have occurred after the conspiracy has been formed and before its accomplishment or abandonment.

Same—Conspiracy—Evidence—Declarations of Co-conspirators.

3. Prior to the formation of a conspiracy for the stealing and disposing of horses entered into between defendant, one M. and one S., the latter without defendant's knowledge urged M. to buy defendant's ranch and pay for it with stolen horses, to be disposed of by defendant. Subsequently such an arrangement was made and the defendant included in the agreement. *Held*, that the conversation between M. and S. was inadmissible against defendant, in a prosecution for grand larceny, inasmuch as it did not appear that defendant knew of the proposition made to M. by S., and that therefore he could not be bound by anything said by them before he had become a party to the conspiracy.

Same—Conspiracy—Evidence—Declarations—Time and Place.

4. In a prosecution for grand larceny, it is not necessary that a witness testifying to declarations of co-conspirators should be required to fix the time and place of their occurrence and give the names of those present before his statements can be admitted in evidence, such rule applying only to cases where it is sought to impeach a witness when under examination.

Same—Evidence of Other Crimes—Admissibility.

5. Where, in a prosecution for grand larceny, the evidence showed a conspiracy under which horses stolen by defendant's co-conspirators were to be disposed of by him for their mutual benefit, evidence of larcenies by his confederates other than the one for which he was on trial was properly admitted as tending to establish the conspiracy and to show intent on the part of the defendant, it appearing that

he disposed of the animals and that the brands on them had been changed prior to their disposal.

Same—Conspiracy—Evidence—Possession of Stolen Property.

6. The possession of stolen horses by defendant, charged with grand larceny, soon after they were stolen was an incriminating fact which, while not sufficient of itself to warrant conviction, tended to establish a conspiracy, alleged to have been entered into between him and his confederates, when taken in connection with the fact that the brands on the animals had been changed and that he received from his confederates, and disposed of, horses with many different brands without inquiry as to where they came from.

Same—Instructions—Felonious Intent.

7. An instruction given in a prosecution for grand larceny defining that crime substantially in the words of the statute, but omitting to supplement such definition by a statement that the taking of the property by defendant must have been done with a felonious intent was erroneous, and the casual use of the term "felonious" in a subsequent paragraph of the charge to the effect that the defendant should be acquitted if the jury were not satisfied that he "had something to do with the felonious taking of the property" did not cure the defect.

Same—Impeachment—Value of Evidence.

8. Contradictions or inconsistencies in the testimony of a witness which grow out of inadvertence, inattention or defect of memory are of less value for impeachment purposes than when they are the results of statements shown to be willfully false.

Same—Contradictions—Value of Evidence.

9. Where contradictions in a witness' testimony arise out of a willful perversion of the truth, the jury may disregard the whole of it, except so far as it is corroborated in other particulars by other credible evidence in the case.

Same—Instructions—Contradictions in Evidence—Invasion of Province of Jury.

10. While the jury may inquire whether contradictions in a witness' testimony are only apparent or due to lapse of memory or the like, or to willful perjury, and determine its weight accordingly, it is error in a criminal case to instruct them that "prominent and striking" contradictions should be attributed to deliberate perjury rather than to the ordinary infirmities of mankind, in that such a statement invades the province of the jury.

Same—Instructions—Witnesses—Invasion of Province of Jury.

11. An instruction submitted to the jury in a criminal prosecution, that where witnesses to the same transaction perfectly and entirely agree on all points connected with it, a suspicion of practice and concert is engendered and should to this extent be discredited, is an invasion of the province of the jury and erroneous.

Same—Instructions—Circumstantial Evidence—Value.

12. The trial court in charging the jury in a criminal case as to the value to be given to circumstantial evidence, should include a statement that conviction should follow only if the circumstances are such as to satisfy their minds of defendant's guilt beyond a reasonable doubt to the exclusion of every other reasonable hypothesis, and should not instruct that they should convict if such evidence convinces their "guarded judgment."

Same—Instructions—Circumstantial Evidence—Invasion of Province of Jury.

13. *Seemle*: It would seem that an instruction in a criminal prosecution that circumstantial evidence is in many cases quite as convincing as direct and positive evidence, is subject to the criticism that it comments on the weight of the evidence and invades the province of the jury.

Same—Instructions—Assumption of Facts—Principal—Accomplice.

14. For the district court to assume, in a criminal prosecution, in its charge to the jury, that a certain person was an accomplice of the defendant, was an assumption of the defendant's guilt of the crime charged and erroneous, since it implied that a crime had been committed and that there was a principal.

Same—Instructions—Definition of Principal.

15. An instruction submitted in a prosecution for grand larceny, that a person who "advised or encouraged" another in the commission of a crime is to be considered a principal, instead of "advised and encouraged," the words used in section 41 of the Penal Code in defining the term "principal," was not prejudicially erroneous, the words "advised" and "encouraged" being synonymous in popular meaning.

Same—Instructions—Definition of Principal.

16. *Held*, in a criminal appeal, that the use of the disjunctive "or" in defining a principal as one who "aids or abets" in the commission of a crime instead of the conjunctive "and," as prescribed by Penal Code, section 41, was erroneous, because the word "aid" does not imply guilty knowledge or felonious intent, while the term "abet" does include knowledge of the wrongful purpose of the perpetrator of, and counsel and encouragement in, the crime.

Same—Instructions—Duty of Finder of Property.

17. Where in a prosecution for grand larceny no facts or circumstances are proven justifying the inference that the property alleged to have been stolen had been found by defendant or anyone else, an instruction as to the duty of a person finding property to restore it to the owner or to make a reasonable effort to do so is inapplicable and should not be given.

Same—Instructions—Definition of Crime.

18. An instruction embodying the provisions of sections 20 and 21 of the Penal Code upon the presence of joint operation of act and intent in order to constitute a crime, should be given in every criminal prosecution, especially when requested by defendant.

Instructions—Where Refusal not Error.

19. Where requested instructions are fairly covered by those given, a refusal of those asked is not error.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

A. W. ALLEN was convicted of the crime of grand larceny, and appeals from the judgment of conviction and an order denying his motion for a new trial. Reversed and remanded.

Mr. J. L. Staats, and Mr. George D. Pease, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, having been convicted of the crime of grand larceny, has appealed from the judgment of conviction and an order denying him a new trial. He challenges the integrity of the judgment on the grounds: (1) that the information does not charge the offense of grand larceny; (2) that the verdict is contrary to the evidence; (3) that the court committed prejudicial error in admitting certain evidence; and (4) that the defendant was prejudiced by certain instructions submitted to the jury, and the court's refusal to submit others requested.

1. The information charges that the defendant committed the crime of grand larceny in Gallatin county on or about October 10, 1905, "in that he then and there willfully, unlawfully and feloniously, and with the intent then and there to steal, did take, steal, carry, and drive away," etc., a certain bay mare and colt of the personal property of one Dan. Inabnit, describing them, contrary to the form, etc. The contention is made that the charge is fatally defective in that it fails to allege that the taking was with felonious intent. In this contention defendant is wrong. Leaving out the clause "and with the intent then and there to steal," the charge would read: "Willfully, unlawfully, and feloniously did take, steal, carry, and drive away," etc. The term "feloniously" imports criminal intent, and furnishes exactly the element which counsel say is wanting. The addition of the clause which we have omitted does not take from or add to the substance of the charge, which we think is a sufficient statement of the intent with which the taking was done, both at common law (Wharton's Precedents, 415), and under our statute (Penal Code, sections 880 and 883, as amended by Session Laws of 1897, page 247).

In construing section 880, *supra*, this court, in *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 264, held an instruction erroneous which failed to tell the jury that a criminal intent was necessary to constitute the crime of grand larceny. It was also held in the same case, however, that it was not necessary to use the word "feloniously" in describing the crime, but that it was enough if the criminal intent expressed in that technical word is included in appropriate terms. The same general principle applies to pleading. While the important distinctions between larceny and embezzlement have been destroyed by our statute making both larceny at common law and embezzlement larceny, the general principle of pleading has not been changed. (*State v. Dickinson*, 21 Mont. 595, 55 Pac. 539.) If the information charges in appropriate terms the felonious or criminal intent, it is not necessary to use the technical word "feloniously." In this case, however, we see that this technical term was used as applied to the taking, and hence the felonious intent is sufficiently alleged.

2. It is earnestly contended that the defendant was convicted upon the uncorroborated testimony of an accomplice, and, therefore, that under section 2089 of the Penal Code, the judgment cannot stand. It is true that the only direct evidence against the defendant was given by one Maxwell, who testified that the defendant, one Sloan, and himself entered into an agreement under the terms of which Maxwell and Sloan were to steal horses from the range in Gallatin county, and turn them over to defendant, who undertook to dispose of them for the mutual benefit of all. Since the judgment and order must be reversed on other grounds, we shall refrain from discussing the evidence further than to say that we think the independent corroborative evidence tending to connect the defendant with the commission of the larceny charged, together with the evidence of the accomplice, sufficient to make out a case to go to the jury on the question of his guilt.

3. Maxwell stated in his testimony that on the day before the agreement was entered into, he assisted Sloan in driving

some horses to the house of the defendant, which Sloan intended to turn over to the defendant to be by him delivered to one Stevens in part payment for a ranch which defendant and Sloan had agreed to purchase from Stevens. After some conversation between Sloan and the defendant, it was agreed between them that Sloan might be released from carrying out his part of the agreement with Stevens, and that its performance would be undertaken by the defendant. Thereupon a proposition was made to Maxwell to buy from the defendant the ranch where the latter was then living. Maxwell at first demurred, saying that he had no money. Defendant told him that he would take payment in horses. Maxwell and Sloan then went out to look over the place, leaving defendant at the house. Sloan seemed anxious to have the trade made; so, while he and Maxwell were together, he urged Maxwell to buy the place, telling him that he had been doing business with the defendant for a long time, that he could be trusted, that Maxwell could steal horses enough to make the payments, and that defendant would take and handle them for him. It is apparent from the use of the expression "doing business," in the testimony of this witness, that he intended to be understood as saying that Sloan meant that he had been stealing horses for a long time, and that defendant had been handling them for him. Upon their return to the house an agreement was made between the defendant and Maxwell, that Maxwell would take the place, that he and Sloan would steal horses from the ranges in the southern part of Gallatin county, and that the defendant would receive them and allow a fixed price for them of \$25 each for all of a certain grade, each of the parties to the agreement to have one-third of the proceeds. Later the defendant agreed to take all the horses brought to him by Maxwell and Sloan, sell them and divide the proceeds, giving Maxwell credit for his share on the price of the ranch. The horses driven to defendant's place by Sloan and Maxwell on their first visit were taken away by Sloan, and, so far as appears, defendant took no part in the disposition of them. Nor did Maxwell after-

ward have anything to do with them. So that, even if a conspiracy theretofore existed between defendant and Sloan, the result of this meeting was an abandonment of it and the formation of a new agreement for a different purpose. The court overruled defendant's objection to the testimony of the witness so far as it detailed the conversation had between him and Sloan out of the hearing of the defendant.

The contention is made that the admission of this evidence was prejudicial error. We think it was. There is no rule better settled than that the acts and declarations of a co-conspirator done and made in furtherance of a common design are admissible against all the other parties to the conspiracy, whether done or made in their presence or with their knowledge or not. (*State v. Byers*, 16 Mont. 565, 41 Pac. 708; *Pincus v. Reynolds*, 19 Mont. 564, 49 Pac. 145; *Wigmore on Evidence*, 1079; 8 Cyc. 679.) It is founded upon the principle that when two or more persons are associated together to accomplish some unlawful purpose, each one is, for the time being, the agent for the others and binds them by his acts and declarations done and made in furtherance and in aid of the common purpose. But to be admissible, the acts and declarations must have occurred during the life of the conspiracy, that is, after it has been formed and before its accomplishment or abandonment.

Applying the rule, with these limitations, to the evidence in question, it should have been excluded; for, admitting, for the sake of argument, that Sloan and Allen, the defendant, had theretofore been engaged in a scheme to steal horses and sell them for their mutual profit, Maxwell was not a party to the scheme, and, therefore, was not a co-conspirator with Allen in it. It was only after the contract of purchase of the Stevens' place had been abandoned by Sloan that the arrangement for the purchase from defendant by Maxwell was broached, and by its completion only did Maxwell become associated with them. Up to the time of this visit to Allen's place by Maxwell in company with Sloan, Maxwell and Allen had been strangers. So far as the proof shows, they had had no connection with each

other in any sort of enterprise. Nor does it appear that Allen knew that Sloan intended to make any such proposition to Maxwell as he did make. Therefore the conversation between Maxwell and Sloan was had before the inception of the criminal purpose, and, though it had reference to this criminal purpose which was afterward formed and carried out, at the time it was had, Allen was not a party to it, and therefore could not be bound by anything said by them.

4. Like objections were made to other conversations had between Maxwell and Sloan out of the presence of the defendant, after the agreement was made. These conversations all had reference to the purpose of the conspiracy, and occurred while Maxwell and Sloan were hunting for horses on the range, which they intended to, and subsequently did, deliver to defendant or from which he made selections. They were therefore competent, and were properly admitted in evidence.

5. Further objection was made to all of these conversations on the ground that the witnesses testifying to them were not first required to fix the time and place of their occurrence and the persons present. The declarations of a party against his interest concerning the subject of the controversy are always admissible against him as substantive evidence in aid of his adversary. It is not necessary that the circumstances of time, place, etc., should be stated to render them competent. The rule invoked by counsel applies only to cases where it is sought to impeach a witness who is undergoing examination. In such case it is but fair to the witness that his attention should be called to the time and place and attendant circumstances so that he may have an opportunity to explain. The statute declares that this must be done (Code Civ. Proc., sec. 3380). But one way to secure advantage of the declarations of a party is to prove them as substantive evidence by witnesses who know of them, leaving it to his counsel to bring out the attendant circumstances upon cross-examination, and thus enable the party himself to explain or contradict it.

6. It is argued that the court was in error in admitting evidence of other larcenies. It appears, however, that they were all committed by Sloan and Maxwell within three or four weeks subsequent to the date of their first visit to defendant's place; and in view of the fact that the brands on some of the animals were subsequently changed, and that most of them were received and disposed of by defendant, the evidence was competent as tending to establish the conspiracy, and also to show intent on the part of the defendant. The possession of the property by the defendant soon after it was stolen was itself an incriminatory fact, not sufficient, standing alone, to warrant conviction; nevertheless the fact of such possession, coupled with the changed brands, knowledge of which he must have had, and, further, the fact that he received, at different times, animals with many different brands, without inquiry as to whence they came, tended in some measure, at least, to support the inference that a conspiracy existed; and, since the different larcenies were committed as parts of the scheme, evidence of them was competent, because every act done in furtherance of it could properly be proved as part of it, even if the proof of it tended to establish a distinct crime. (*State v. Stevenson*, 26 Mont. 332, 67 Pac. 1001.)

7. In the charge to the jury, the court defined grand larceny substantially in the words of the statute, as follows: "The definition of grand larceny applicable to this case is as follows: Every person who, with the intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person, takes from the possession of the true owner any mare, gelding, or colt, is guilty of grand larceny." (Instruction No. 2.) The defendant finds no fault with this definition, but contends that, since a taking of personal property from the owner thereof cannot be a crime unless it be done with felonious intent, the definition should have been supplemented by an additional statement telling the jury in appropriate terms that

the taking must have been done with such intent, or there could be no conviction.

In *State v. Rechnitz, supra*, the instruction submitted to the jury used substantially the language employed by the statute. Counsel for appellant in that case made the same contention as is made here, and this court, upon a review of the authorities, both text-writers and adjudicated cases, sustained the contention on the ground that whatever the definition given to the crime of larceny by statute may be, the criminal intent is a necessary ingredient of it, and, if not expressed therein in *appropriate* terms, must be imported into it by the court in applying it to particular cases. Otherwise, every taking of personal property from the possession of the owner, with the intention to deprive him of it, would fall within the purview of the statute, and would be larceny. A sheriff taking it under process or anyone taking it under a *bona fide* but mistaken claim of ownership, if yet with intent to deprive the owner of it, could under the terms of the statute be convicted. Under the authority of that case, which we think was correctly decided, the contention of defendant must be sustained. There was no other instruction submitted sufficiently explicit to cure the defect. The word "felonious" appears in the charge but once, and that in a subsequent paragraph in which the distinction between the crimes of grand larceny and knowingly receiving stolen property is pointed out. It occurs in the sentence: "If you are not satisfied from the evidence in this case beyond all reasonable doubt, that the defendant had something to do with the felonious taking of the property * * * it is your duty to acquit." This casual, incidental use of the technical term was not intended, nor could it have been understood by the jury to import into the formal definition of the crime theretofore given the necessary modification to make it a correct statement of the law.

8. Among other instructions as to the credibility of witnesses, not complained of by the defendant, the court gave the following: "The court instructs that partial variances in the testimony of different witnesses on minute and collateral points are of

little importance unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention, or defect of memory; that it so rarely happens that witnesses of the same transaction perfectly and entirely agree on all points connected with it that any entire and complete coincidence in every particular, so far from strengthening their credit, only indirectly engenders a suspicion of practice and concert; and that in determining upon the credence to be given to testimony by the jury the real question must always be whether the points of variance and discrepancy are of so strong and decisive a nature as to render it impossible or difficult to attribute them to the ordinary sources of such variance, viz., inattention or want of memory." (Instruction No. 10.)

Irrespective of the doubtful propriety of giving such an instruction in any case we think this invades the province of the jury in two respects. In the first place a witness may always be impeached by evidence tending directly to contradict his story (Code Civ. Proc., sec. 3379), or indirectly by showing that he has made at other times statements inconsistent with it (Code Civ. Proc., sec. 3380); and the contradiction or inconsistency is of more or less value as an impeachment, according as it is upon an important or unimportant material statement in the story. If it grows out of inadvertence, inattention, or defect of memory, it is of less value than when it is the result of a statement shown to be willfully false. Contradictions arising out of defect of memory, and the like, do not ordinarily destroy the credit of the witness' story as a whole, but only so far as the story is manifestly inaccurate. But where it arises out of a willful perversion of the truth, the jury may disregard the whole of it, except so far as it is corroborated in other particulars by other credible evidence in the case. But it is a fact commonly observed, that the variations in the stories of witnesses, even in the most important particulars, are as often due to inattention, inadvertence and failure of memory, as to willful perjury; and while it is eminently proper for the jury to inquire whether the contradiction is only apparent or due

to lapse of memory, or the like, or to willful perjury, and determine its weight accordingly, it is a clear invasion of the province of the jury for the court to say that "prominent and striking" contradictions should be attributed to deliberate perjury, rather than to the ordinary infirmities of mankind. The jury are the exclusive judges of the credibility of the witnesses, and should be left, under proper instructions, to determine from what cause the contradictions and inconsistencies therein arise, and to weigh the evidence accordingly.

Nor is it a correct statement of the law that coincidence in all particulars in the stories of two or more witnesses always casts suspicion upon their evidence. This is often the case, but the rule is not of universal application. Two such stories may coincide literally, and yet be true. It is therefore manifestly an invasion of the province of the jury for the court to say to them that such evidence must be viewed with suspicion and to this extent discredit it by expressing an opinion upon it. It is for the jury to examine the stories and say whether they are true. We have not found a similar instruction approved by any court or text-writer, and deem it clearly open to the fault found with it by appellant.

In this connection we may observe that it is far safer for a trial court to make use of instructions generally approved by the courts, rather than to risk the danger of invading the province of the jury by formulating new ones. The expression of this instruction is confused and contradictory to such an extent that it is hardly possible that a jury of ordinary men would be able to understand exactly what the court did mean by it.

9. Many other errors are assigned upon the instructions submitted. We briefly refer to such of them as require notice. Upon the value of circumstantial evidence the jury were instructed substantially, that such evidence should be regarded by the jury in all cases; that it is in many cases quite as convincing as direct and positive evidence; that when it is strong and satisfactory the jury should so consider it, neither enlarging nor belittling its force; that it should have its just and fair weight;

and that if when taken as a whole and fairly and candidly weighed, it convinces the guarded judgment the jury should convict. The fault found with this statement is that it is misleading, in that it tells the jury that if such evidence convinces the guarded judgment they should convict, whereas, if the evidence convinces the jury of defendant's innocence, or raises a doubt of his guilt, he should be acquitted. Reading this paragraph with the rest of the charge, we do not think the jury could have been misled; yet, it should have stated that the jury should convict only if the circumstances were of such a character as to satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt to the exclusion of every reasonable hypothesis other than the guilt of the defendant.

The instruction submitted was taken substantially from section 729 of Hughes' Instructions to Juries and seems to find approval in *State v. Elsham*, 70 Iowa, 531, 31 N. W. 66. In copying it, however, the instruction was altered so as to make it say to the jury that they should under such circumstances convict, whereas the text correctly states: "And if, when it (such evidence) is all taken as a whole and fairly and candidly weighed, it convinces the guarded judgment, the jury should act upon such conviction"—quite a different proposition. We question, also, whether it would not have been better to omit the second sentence of the paragraph as coming perilously near invading the province of the jury by commenting upon the weight of the evidence. But this point was not made, and we do not decide it.

10. Paragraphs 15 and 16 of the charge assume that Maxwell was an accomplice of the defendant. The assumption was clearly erroneous. To assume that there is an accomplice is an assumption that a crime has been committed and that there is a principal; for there can be no accomplice without a crime and a principal. Therefore, the assumption that Maxwell was an accomplice was an assumption of defendant's guilt of the crime charged. Other portions of the charge fully and fairly submitted the question of complicity to the jury, and they may

not have been misled by the assumption, but the error should be avoided on another trial.

11. Paragraph 25 of the charge is as follows: "All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or even if not present at its commission, have advised or encouraged its commission, are principals in the crime so committed; so, if you find from the evidence, beyond a reasonable doubt, that Roland T. Sloan or Ross Maxwell or the two together stole the horses in question with or without others, and that they were in such act in any way aided or abetted by the defendant Allen in the commission of the crime the defendant knowing the nature and purpose of the acts so being committed by said Sloan and Maxwell, or either of them, or that the defendant in any way knowingly advised or encouraged them, or either of them, in the commission of such crime the defendant is guilty, and you should so find by your verdict."

The adverse criticism made of this statement is that the use of the disjunctive "or" instead of "and" between the words "advise" and "encourage" is a departure from the statute (Pen. Code, sec. 41), and must, therefore, have been prejudicial. In *State v. Geddes*, 22 Mont. 68, 55 Pac. 919, the same substitution of terms was considered somewhat and a doubt was expressed as to whether it was fatal to the instruction. But it is always safer to follow the statute. We do not see how, on principle, however, it makes any particular difference whether the disjunctive or conjunctive particle is used here. The word "advise," in the sense here used, means "to give counsel to; to offer an opinion to, as worthy or expedient to be followed; to recommend as wise and prudent; to suggest as the proper course of action." The term "encourage" means "to give courage to; to incite to action or perseverance." While the terms are not synonymous in a technical sense, in popular usage they are; and it would seem that one who suggests to another that the commission of a crime is wise, or that it is a proper course of action, and the advice so given is followed should very

properly be said, in a popular sense, to have encouraged it. To incite to action also involves the idea of giving advice to the same end. So that, avoiding a strictly technical construction and giving the terms employed a more liberal and popular meaning, which is the correct canon of construction to be applied in such cases, there is no difference in principle between giving advice and giving encouragement, and criminal responsibility should be regarded as attaching to the giver in either case. By the ordinary mind no distinction is drawn between the two.

A more serious objection to the instruction (not noticed by counsel) might have been urged to the use of the disjunctive between the terms "aided" and "abetted." In *People v. Dole*, 51 Pac. 945, the supreme court of California, in department 1, held that the use of the disjunctive "or" was not fatal error, because "to the ordinary mind, one who aids or assists in the commission of the crime of forgery is guilty; and this is true, because to such a mind criminality is included as an element in the act of the party aiding or assisting." In the same case, however, in 122 Cal. 486, 55 Pac. 581, the court in bank decided that the use of the disjunctive was prejudicial error. The court said: "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. The error in the instruction is, therefore, clear, and it cannot be held to be harmless error to instruct a jury that they must convict upon proof of a fact which does not necessarily imply guilt." This case is cited with approval in *People v. Compton*, 123 Cal. 403, 56 Pac. 44, upon the same point, and we think the views therein expressed are correct. Aside from the person who actually commits the crime, no person could, under the statute, be guilty of the crime who does not aid *and* abet in it; and a person may aid in it by unconsciously, and therefore innocently, doing some act essential to its accomplishment.

12. In another paragraph of the charge the court instructed the jury as to the duty of a person finding property to restore

it to the owner, or to make a reasonable effort to do so. This instruction should not have been given, since there were no facts or circumstances proven in the case justifying the inference that the animals alleged to have been stolen had been found by defendant or anyone else. It was not applicable to the facts of the case.

13. Defendant's requested instruction No. 9 should have been given. It embodies sections 20 and 21 of the Penal Code, and should always be given, especially when requested by the defendant.

14. Instruction No. 11, requested, deals with the element of felonious intent. It is a correct statement of the law applicable to the case and should have been given. What has already been said on this subject, however, renders further remark unnecessary. Most of the other instructions requested and refused were fairly covered by the instructions given. The remarks heretofore made are sufficient to guide the court on another trial without special discussion of the questions presented and discussed by counsel with reference to them.

Let the judgment and order be reversed and the cause be remanded for a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

STATE, RESPONDENT, v. HOUK, APPELLANT.

(No. 2,329.)

(Submitted October 6, 1906. Decided October 22, 1906.)

Criminal Law—Homicide—Instructions—Self-defense.

Homicide—Instructions—To be Read as a Whole—"Malice Aforethought."

1. Where the jury on a trial for murder had been clearly and carefully instructed as to all grades of unlawful homicide, and, also, as to what constitutes justifiable homicide, and that defendant could not be convicted of murder of the first degree unless it appeared

from the evidence beyond a reasonable doubt that all the necessary elements including "malice aforethought" were present, the omission of that term in a subsequent paragraph of the charge,—which dealt with the proposition that it was not necessary that the unlawful design to take life should have been entertained for any precise length of time, and that if done in furtherance of such design and without lawful excuse "as explained in these instructions," they should convict the defendant of murder of the first degree,—was not prejudicial or misleading, since the whole charge, when read and construed together, was a correct exposition of the law and not inconsistent or conflicting.

Same—Instructions—Malice Aforethought.

2. Defendant having been convicted of murder of the second degree, the omission of the term "malice aforethought" in an instruction dealing with murder of the first degree, after all grades of unlawful homicide had been correctly defined in preceding paragraphs of the charge, could not have misled the jury to his prejudice.

Same—Instructions—Self-defense—Reasonable Person Standard.

3. Where the trial court in a prosecution for murder instructed the jury that the right of self-defense was to be measured by what a reasonable person would have done under like or the same circumstances, the charge conformed to the requirements of section 361 of the Penal Code and was sufficient.

Same—Instructions—"Beyond All Reasonable Doubt"—Omission.

4. Where the jury had been repeatedly instructed that they could not find defendant guilty of homicide unless the evidence established his guilt beyond all reasonable doubt, the omission of the words "beyond a reasonable doubt" in that part of the charge which stated that if "from the evidence," they found that accused, at the time he shot decedent, did not, as a reasonable man, believe that he was in imminent danger of losing his life, the killing was not in self-defense, did not constitute prejudicial error as leading the jury to believe that a verdict of guilty could be found on a mere preponderance of the evidence.

Appeal from District Court, Beaverhead County; Lew L. Callaway, Judge.

SIDNEY HOUK was convicted of murder in the second degree, and appeals from the judgment of conviction and from an order denying him a new trial. Affirmed.

Mr. Edwin Norris, Mr. C. W. Robinson, and Mr. J. H. Duffy,
for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poor-
man, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of murder of the second degree. He has appealed from the judgment of conviction and from an order denying him a new trial.

The questions submitted for decision arise upon certain paragraphs of the charge submitted to the jury which follow:

"No. 31. You are instructed that while the law requires, in order to constitute murder of the first degree, that the killing must be willful, deliberate, and premeditated, still it does not require that the willful intent, premeditation, or deliberation, shall exist for any length of time before the crime is committed; it is sufficient that there was a design and determination to kill distinctly formed in the mind at any moment before or at the time the Winchester rifle gun was fired; and in this case if you believe from the evidence, beyond a reasonable doubt, that the defendant feloniously shot and killed the deceased, as charged in the information, and that before or at the time the shot was fired, the defendant had formed in his mind a willful, deliberate, and premeditated design or purpose to take the life of the deceased, and that the shot was fired or that the fatal blow was given in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, then you should find the defendant guilty of murder in the first degree."

"No. 35. The court instructs you, that in order to justify the use of a deadly weapon in self-defense, it must appear to the defendant that the danger was so urgent that, in order to save his own life, or to save himself from great bodily harm, the attack upon the deceased was absolutely necessary. And it must appear that the deceased was the assailant, or that the defendant had really and in good faith endeavored to decline any further struggle before the fatal shot was fired. A bare fear of the commission of the offense, to prevent which defendant used a deadly weapon, is not sufficient to justify it; but the circumstances must be sufficient to excite the fears of a reasonable man, and the

party attacking must have acted under the influence of such fears alone. It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is enough that it be an apparent danger; such an appearance as would induce a reasonable person to believe he was in danger of great bodily harm. Upon such appearance a party may act with safety, nor will he be held accountable though it should afterward appear that the indications upon which he acted were wholly fallacious, and that he was in no actual peril. The rule in such case is this: What would a reasonable person—a person of ordinary caution, judgment, and observation—in the position of the defendant, seeing what he saw, knowing what he knew, suppose from this situation and these surroundings? If such reasonable person so placed would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril and acting upon such appearances.”

“No. 37. If, however, you find from the evidence that at the time he shot Owen F. Ellis the defendant did not, as a reasonable man, believe he was in imminent danger of losing his life or suffering great bodily injury at the hands of the said Owen F. Ellis, then the killing was not done in self-defense, but was either murder or manslaughter, no matter who began the affray, and even though the defendant had really and in good faith endeavored to decline any further struggle, and had so informed the said Owen F. Ellis.”

The fault found with paragraph 31 is that it omits the expression “malice aforethought,” an essential element of the crime of murder, and also conflicts with paragraphs 29 and 30 of the charge as given. In preceding paragraphs of the charge the court had defined all grades of unlawful homicide, pointing out and defining clearly and carefully the distinguishing elements necessary to constitute any grade of the crime. It had also correctly defined and distinguished justifiable homicide. In paragraphs 29 and 30 it further explicitly told the jury that the defendant could not be convicted of murder of the first de-

gree unless it appeared from the evidence beyond a reasonable doubt that all the necessary elements, including malice aforethought, were present. In the paragraph in question it then properly pointed out that it was not necessary that the unlawful design to take life should have been entertained for any precise length of time, but that it was sufficient if it was the result of deliberate premeditation and prompted the killing. The court was at the moment dealing particularly with this element and no other. It then proceeded to say that, if the killing appeared to have been done in furtherance of such design and without lawful excuse, "as explained in these instructions," the jury should convict the defendant of murder of the first degree. Under this condition of the instructions it is hardly conceivable that the jury could have been misled. Besides, even if the paragraph is open to the objection made, it seems apparent that the jury were not misled, because the defendant was not convicted of the higher grade of the crime with which the court was then dealing.

In considering a charge it should be read as a whole and judged accordingly. The court cannot discuss all phases of the law or cover every branch of the case in one paragraph. An isolated sentence or paragraph of a charge may be subject to adverse criticism when standing alone, but, when read in its proper connection, no fault can be found with it. Such, in our opinion, is the case here. When read in connection with other parts of the charge, particularly paragraphs 29 and 30, it is not only a correct exposition of the law but is entirely consistent with these paragraphs and the rest of the charge.

But counsel say that that paragraph is almost a literal copy of an instruction criticised by this court in *State v. Shafer*, 22 Mont. 17, 55 Pac. 526, and held to be objectionable. A comparison of the two shows that this contention is without foundation. The instruction in the *Shafer Case* not only omitted the expression "malice aforethought," but by the use of the word "only," in the phrase "it is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and pre-

meditation on the part of the slayer," etc., actually excluded that element. Furthermore, the defendant in that case had been convicted of murder of the first degree and the court was constrained to disapprove the instruction because it was, for the reason just stated, not in harmony with the rest of the charge.

The criticism made of paragraph 35 is that it does not state the legal standard by which the defendant's right to act upon appearances should be measured. It is said that he had a right to act upon appearances as they were presented to him, as a reasonable person; whereas the jury were told that his right was to be measured by what a reasonable person would have done under like or the same circumstances. The statute (Penal Code, sec. 361) adopts the reasonable person standard, for it declares that the circumstances must be sufficient to excite the fears of a reasonable person, and it must control. But after all, what substantial difference is there in the meaning of the two phrases, "fears of a reasonable person" and "fears of the defendant as a reasonable person"? We can see none. If the defendant must act upon appearances as a reasonable person, then his conduct must be judged by what a reasonable person would have done under the same circumstances and this is the legal measure of his right. Counsel cites *State v. Rolla*, 21 Mont. 582, 55 Pac. 523, in support of his contention; but it is apparent from a reading of the opinion that the court's attention was not directed to the refined technical distinction for which contention is now made, and that it had no such notion in mind when it used the language it did. In any event, in this case the court followed the statute, and that must be held sufficient.

It is said that paragraph 37 is erroneous, in that it omits the words "beyond a reasonable doubt," after the word "evidence" in the first line. This paragraph was copied from *State v. Tighe*, 27 Mont. 327, 71 Pac. 3. The remarks made above upon instruction 31 are pertinent here. Standing alone, the statement may be open to the criticism made, but, when read in connection with the other parts of the charge, wherein the court again and again declared that the evidence must be sufficient to establish the

guilt of the defendant beyond all reasonable doubt before the jury could convict, they could not have understood that they could find a verdict of guilty upon a mere preponderance of evidence.

Counsel for defendant assigns as error the refusal of the court to give certain instructions requested. The remarks upon the instructions given sufficiently meet all contentions made in that behalf.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. FARRISS, APPELLANT.

(No. 2,310.)

(Submitted October 2, 1906. Decided October 22, 1906.)

Criminal Law—Appeal—Record.

Criminal Law—Record—Appeal—When Merits will not be Considered.

1. The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record, nor identified in any way by the certificate of the clerk of the district court or the trial judge.

Same.

2. The supreme court will not hesitate to dismiss an appeal in a criminal case on the ground that the proper record is not before it, where appellant's attention had been called to the defect by the state's brief for a period of two months prior to the day of hearing, without any attempt on his part to have the record corrected so as to conform to the requirements of the statute.

Appeal from District Court, Silver Bow County; Michael Donlon, Judge.

SHABIN FARRISS was convicted of assault in the first degree. He appeals from the judgment and from an order denying him a new trial.

Mr. Edwin S. Booth, and Mr. H. A. Frank, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondent.

Mr. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of assault in the second degree and sentenced to a term of three years in the state prison. He has appealed from the judgment and an order denying him a new trial.

The attorney general makes the contention that the appeals may not be considered on their merits, for the reason that the transcript filed in this court does not contain an authenticated copy of the record of the trial in the district court, but a bill of exceptions only, settled, signed, and allowed by the judge who tried the cause. We think the contention must be sustained. Section 2229 of the Penal Code provides how the record shall be made up. The papers constituting the record proper cannot be brought up in a bill of exceptions, but must be certified up by the clerk as the record. (Penal Code, sec. 2281; *State v. Morrison, ante*, p. 75, 85 Pac. 738.)

In the transcript before us are what purport to be the papers constituting the record proper; but they are included in the bill of exceptions, and are not certified as the record, nor are they identified in any way by the certificate of the clerk or judge. Such being the case, there is no legal evidence before this court of what the action of the district court was, and consequently the merits of the appeals may not be considered. We more readily sustain the position of the attorney general because of the fact that though his brief has been on file since August 8th, and the appellant has been fully aware of the contention, he has not asked this court to have the record corrected so as to conform to the requirements of the statute.

There being nothing before this court upon which an examination of the appeals upon their merits may be had, the judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. TEAGUE, APPELLANT, v. BOARD OF COMMISSIONERS OF SILVER BOW COUNTY ET AL., RESPONDENTS.

(No. 2,314.)

(Submitted October 3, 1906. Decided October 29, 1906.)

Elections—County Commissioners—Constitutional Amendments—Judicial Notice—Mandamus.

District Courts—Judicial Notice—Constitutional Amendments—Evidence.

1. While, as a general rule, a court may take testimony to refresh its memory on matters of which it is required to take judicial notice, it should not do so,—on motion to quash an alternative writ of mandate,—for the purpose of informing itself of the regularity of the adoption of a constitutional amendment, where by reason of a proclamation of the governor declaring the amendment to have been adopted, the amendment was *prima facie* a law, of which fact the court was sufficiently informed.

County Commissioners—Constitutional Amendments—Regularity of Adoption—Pleading and Practice—Mandamus.

2. After the amendment to the Constitution relative to the election and tenure of county commissioners (Session Laws, 1901, p. 208) had been declared regularly adopted by proclamation of the governor, it thus becoming *prima facie* a law of which courts took judicial notice, it was incumbent upon relator in a proceeding in *mandamus*, in which the regularity of the adoption of the amendment was attacked, to plead facts showing a noncompliance with the provisions of the Constitution which prescribe the mode to be pursued in amending that instrument; and for failure to so plead, and in the absence of an offer to amend, the court properly sustained a motion to quash.

Same—Separate Amendments to Constitution—Manner of Submission.

3. *Held*, that the amendment to Article XVI, section 4 of the Constitution changing the term of county commissioners from four years to six years, extending the tenure of the then incumbents, and giving district judges power to fill vacancies on the board, is not violative of section 9, Article XIX of the Constitution, providing that separate

amendments must be prepared and distinguished by numbers, or otherwise, so that they may be voted upon separately, but that such amendment must be considered as one scheme, with the single purpose of establishing and maintaining in existence a board, two of whom at all times are experienced men.

Officers—County Commissioners—Constitutional Amendments—Extending Official Tenure.

4. The amendment to Article XVI, section 4 of the Constitution changing the tenure of county commissioners from four years to six years, and extending the tenure of the then incumbents, is not violative of Article V, section 31 of that instrument, providing that no law shall extend the term of office of any public officer after his election, the term "law" as used in that section having reference to legislative enactments only.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

MANDAMUS by the state of Montana, on the relation of Peter Teague, against the board of county commissioners of Silver Bow county, Montana, W. D. Clark, and others. From a judgment of dismissal, relator appeals. Affirmed.

Mr. John F. Davies, and Messrs. Mackel & Meyer, for Appellant.

Mr. C. F. Kelley, and Mr. Edwin M. Lamb, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal from an order of the district court of Silver Bow county sustaining defendant's motion to quash the alternative writ issued and dismissing the proceedings, and from the judgment which was accordingly entered against relator.

Relator's affidavit in the *mandamus* proceedings recited that the defendant commissioners were the qualified and acting board of commissioners of Silver Bow county, and, as such, acted as the board of canvassers for the year 1904; that, prior to the election of that year, the relator with two others were nominated to be voted for severally at the next election for the office of county commissioner; that the votes were canvassed and that

the relator and the two others received the highest number of votes of those cast for the several candidates for the positions named; that demand was duly made upon the canvassers to declare the relator and the others as elected to the office mentioned, and to order and direct a certificate of election to issue to the relator, but that the defendants wholly failed and refused to do so. The alternative writ was issued, and a motion to quash was filed. This motion duly coming on for hearing, the court's attention was invited to the fact that the relator based his application upon the alleged fact that the constitutional amendment submitted to the people at the said election, and known as House Bill No. 55 (Session Laws 1901, p. 208), had not been legally adopted, for the reason that the same had not been published in manner and form and for the length of time required by section 9, Article XIX of the Constitution. The court held that this question was one of law for the court, and that it would take judicial notice of the manner of the supposed adoption of said amendment. The court further concluded that it would hear evidence upon the point in order to actually acquaint itself with that of which it took such notice. Thereupon certain evidence was introduced tending to show that the amendment had not been published for the period required by the Constitution, in any paper designated by the Secretary of State for that purpose in said county. The court, after taking this evidence, held that the amendment had been adopted in manner and form as required by law. Hence this appeal.

Almost all of the argument of the appellant, relator in the court below, is devoted to the question as to whether or not the Secretary of State did in fact *cause* the proposed amendment to be noticed and published in the paper of his selection in the said county the required length of time. A great deal of discussion is indulged in as to what is three months' notice. Other questions are raised which will be considered later.

So far as the taking of evidence by the court to refresh its memory is concerned, there cannot be any doubt that, as a general rule, a court may do so. It may look into an almanac to

refresh its memory as to what time the sun rose at Butte on the 4th of July last. The question before us in this case must be considered as one of practice, and not one of substantive law. The court below, as well as this court, takes judicial notice of the fact that the chief executive of this state, soon after the election of 1902, declared by proclamation to the people of this state that the amendment in question had been adopted. Therefore it was *prima facie* the law at the time the motion to quash was submitted and the motion to quash, therefore, should have been granted without the taking of evidence to inform the court, because the court was already informed *prima facie*. If there were any fatal irregularities in the manner and form of its adoption, and if in fact the amendment was not adopted and therefore did not become part of the Constitution, notwithstanding the fact that the governor declared the same to be part of the Constitution, such attack upon the amendment and such attack upon the *prima facie* presumption of the court that it was a part of the Constitution necessarily should have been set out in the pleading in the first place and proven by the petitioner, relator herein. This was not done. The pleading, on its face, was opposed to the *prima facie* law of the land, of which the court took judicial notice. There was not any offer on the part of the relator to amend his position in order to set out the facts which he attempted to prove in evidence to the court on the motion to quash. The court, therefore, was *prima facie* correct in sustaining the amendment of the Constitution, of which it, as well as we, should take judicial notice.

The next point raised is that, besides the matter of publication, the legislature cannot legally submit a proposed amendment in any form which it *may adopt*, except the constitutional one, and that, if it do submit a proposed amendment in any form not authorized by the Constitution, its action would be a nullity, the point being that an examination of the proposed amendment shows that the legislature sought to provide in the form of one amendment for three separate things, to-wit: (1) The election of commissioners for a term of six years, whereas it had been

therefore only four years; (2) that it attempts to provide for extending the term of the then incumbents long after their election, in other words, to fill certain offices during a certain period of time by means of a constitutional amendment; and (3) it provided how vacancies on the board were to be filled, to-wit: By the judges of the district court. It is urged that these are three separate and distinct matters submitted in one amendment, and that they were not so clearly distinguished by numbers or otherwise so that each could be voted upon separately.

It does not seem to us that these are three separate propositions upon which the people were to be called upon to vote. It is apparent to us, as it must have been to the legislature, that there is only one matter and one subject. The purpose of the legislature was to ask the people at the polls in 1902 whether they wished to amend the Constitution so as to have a board of county commissioners, the term of each commissioner to be six years, one commissioner to go out every two years, with power given to the district judge to fill vacancies at all times in the board, and to have the term of each member of the then existing boards and of short term boards to be elected in 1902 in new counties extended so that the new system might go into effect on the first Monday in January, 1907. This was all one single scheme, with the single purpose of establishing and maintaining in existence a board of commissioners two of whom at all times would be experienced men.

It does not appear to us, as is claimed by counsel, that this amendment is in violation of Article V, section 31, of the Constitution, providing that no law shall extend the term of any public officer after his election. The term "law," as we understand it, in this connection does not refer to the Constitution and the will of the people expressed at the polls in the matter of proposed amendments to that instrument, but relates to laws made by the legislature, which, of course, must not violate any provision of the Constitution. But we do not know of anything in the Constitution which forbids the people to amend their own Constitution, even if the amendment go to the effect of repealing

half thereof, provided the instrument, after amendment, insures a Republican form of government in this state and is not in violation of the Constitution of the United States.

In the brief of relator it is repeated that under Article XIX, section 9, of the Constitution, separate amendments must be prepared and distinguished by numbers or otherwise, so that they can be voted upon separately, provided, however, that no more than three amendments to the Constitution shall be submitted at the same time, and appellant claims that there are three distinct matters submitted in the form of one amendment. As we have said, this does not appear to us to be correct. There is only one logical conclusion and that is that the object of the legislature in submitting this amendment was as we have heretofore stated.

The will of the people in this matter as expressed at the polls was supreme, and, *prima facie*, it appears that the amendment was submitted lawfully and adopted.

Without approving the action of the court below in taking testimony, and without considering what reasons the court below had in sustaining the motion to quash, we conclude that its action was correct in quashing the writ, dismissing the proceedings, and rendering judgment for the respondents.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

ALEXANDER, RESPONDENT, v. GREAT NORTHERN RAIL-
WAY COMPANY ET AL., APPELLANTS.

(No. 2,293.)

(Submitted October 9, 1906. Decided October 22, 1906.)

Appeal—Briefs—Rules of Supreme Court—Dismissal.

1. An appeal will be dismissed where appellant's brief fails to state what pleadings were filed, where they could be found, and what issues were raised, in compliance with paragraph 3, Rule X, of the Rules of the Supreme Court, which provides, among other things, that in cases in which transcripts are not printed, "the briefs shall contain so much of the record as is necessary to make out appellant's case."

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Mrs. G. A. Alexander, Jr., against Great Northern Railway Company and Montana Central Railway Company. Judgment for plaintiff, and defendants appeal. Dismissed.

Mr. E. L. Bishop, for Appellants.

Mr. John A. Shelton, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an appeal by defendants from a judgment of the district court of Silver Bow county in favor of the plaintiff for \$122, and for interest and costs.

The respondent moves to dismiss the appeal upon the ground that appellants have not complied with subdivision a, paragraph 3, Rule X (30 Mont. xxxvii, 82 Pac. x) of the Rules of this court, which provides: "3. The appellant's brief shall contain, in the order here stated: a. A concise abstract or statement of the case, presenting succinctly the questions involved, and the man-

ner in which they are raised. The abstract shall refer to the page numbers in the transcript in such a manner that pleadings, evidence, orders, and the judgment may be easily found: *Provided*, that in cases in which the transcripts are not printed, the briefs shall contain so much of the record as is necessary to make out the appellant's case, with references to the transcript by page and marginal numbers."

The transcript is not printed, and appellants' brief does not anywhere refer to the pleadings, and does not attempt to state the issues, or how they were raised. The purpose of the rule above is to relieve an appellant from the burden of printing the transcript in certain classes of cases, provided his brief contains so much of the record as will make out his case, and proper references are made to the transcript. It may not be necessary to print the pleadings in the brief if concise statements of their contents are made, with proper references to the pages of the transcript where they may be found, but, certainly, appellants do not make out their case in their brief, when they neglect to state whether any pleadings were filed, and, if any were filed, where they may be found, their contents or what, if any, issues were raised. The rule above was adopted for the benefit of appellants, and is deserving of more consideration than an observance of its existence by a breach of its conditions.

The motion is sustained, and the appeal is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

STATE, RESPONDENT, v. NEWMAN, APPELLANT.

(No. 2,302.)

(Submitted October 2, 1906. Decided October 29, 1906.)

*Criminal Law—Forgery—Bounty Certificates—Information—
Evidence—Appeal—Briefs—Instructions—Rules.*[See, also, syllabus in *In re Terrett*, ante, p. 325.]**Forgery—Information—Insufficiency—Waiver.**

1. Defendant, charged with forgery, entered a plea of not guilty. At the trial his counsel objected to the introduction of any testimony on the ground that the information was indefinite, unintelligible and uncertain. *Held*, that defendant, by his plea to the merits, waived any objection to the information on this ground.

Same—Bounty Certificates—Statutes—County Attorneys.

2. The district court ruled correctly when it denied a motion of defendant, on trial for forging a bounty certificate, that the county attorney be required to state whether the prosecution was proceeding under section 3078 of the Political Code, which provides that any person who shall falsely make or counterfeit a bounty certificate shall be guilty of forgery, or under section 840 of the Penal Code, defining the crime of forgery, there being no rule of law making it incumbent on that officer to make known under what section of the Code a defendant is being tried.

Same—Appeal—Prejudice.

3. Where, before the defense of one charged with forging a bounty certificate was begun, it was definitely stated that the prosecution was being conducted under section 3078 of the Political Code, defendant was not prejudiced by a ruling theretofore made overruling his motion that the county attorney be required to state under what particular section of the Code he was proceeding.

Same—Written Evidence—Original Papers.

4. An objection to the introduction in evidence of certain bounty certificates, on the trial of one charged with forgery of such a paper, on the ground that no proper foundation had been laid, was properly overruled, where it appeared that the certificates sought to be introduced were originals properly identified.

Criminal Law—Witnesses—Indorsement on Information.

5. A witness in a criminal prosecution may not be prevented from testifying because his name was not indorsed on the information, where it does not appear from the record that the county attorney knew of the witness at the time he filed the information.

Forgery—Bounty Certificates—Evidence of Other Offenses—When Admissible.

6. In a prosecution of a bounty inspector for forgery, evidence of like offenses with relation to certificates other than the one mentioned in the information was admissible for the purpose of showing

34	434
36	236

34	434
137	373

34	434
140	81

that a system or general plan had been pursued by accused, a guilty knowledge or criminal intent on his part, and to negative the idea that the particular act for which he was on trial was the result of accident, mistake or inadvertence.

Same—Offer of Proof—Defense—Evidence.

7. Proof offered by defendant, a bounty inspector charged with forging a bounty certificate, for the purpose of showing absence of criminal intent on his part in the transaction complained of, to the effect that he, as a furrier and taxidermist, had purchased a number of skins of wild animals, on which bounty had not been paid, and had prevailed upon another person to include such skins in a certificate issued to such other person, and who then swore that he had killed the whole number of animals represented by the certificate, did not constitute any defense, but showed defendant to be also guilty of subornation of perjury and of a felony in purchasing claims against the state under Penal Code, section 136.

Bounties—Who Entitled Thereto.

8. *Obiter*: Under section 3071 of the Political Code, as amended by Session Laws of 1903, page 166, only the person who kills certain wild animals is entitled to bounty, and by selling the skins of such animals to another he waives his right to the bounty, the person purchasing them acquires no right to bounty, and the state is released from any liability thereon.

Appeal—Briefs—Rules—Instructions.

9. Instructions of which complaint is made by appellant, but which are not set out in his brief in *totidem verbis*, as required by Rule X. paragraph 3, subdivision b, of the Rules of the Supreme Court, will not be reviewed.

(MR. JUSTICE MILBURN dissenting.)

Appeal from District Court, Custer County; C. H. Loud, Judge.

T. J. NEWMAN was convicted of the crime of forgery, and appeals from the judgment of conviction and from an order denying him a new trial. Affirmed.

Mr. Sydney Sanner, and Mr. George W. Farr, for Appellant.

(See brief in *In re Terrett*, ante, p. 325.)

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

T. J. Newman was convicted of the crime of forgery, and has appealed from the judgment, and from an order denying his motion for a new trial.

The information in this case is in all substantial particulars the same as the one heretofore considered by this court in *In re Terrett*, ante, p. 325, 86 Pac. 266. The questions of the insufficiency of the information and the unconstitutionality of section 3078 of the Political Code, and section 3072 thereof, as amended by Chapter XCIV, page 166, of the Laws of 1903, are disposed of by the decision in that case.

At the trial the defendant objected to the introduction of any evidence on the ground that the information is indefinite, unintelligible, and uncertain. But this objection, coming after a plea of not guilty, was of course unavailable. The plea to the merits waived this objection. Defendant then moved the court to require the county attorney to state whether the prosecution was proceeding under section 3078 of the Political Code, or section 840 or 848 of the Penal Code. This motion was overruled. We know of no rule of law which requires the county attorney to state the particular section of the Code under which the defendant is being tried. It seems plain enough, from the information in this case, that it was drawn under section 3078 of the Political Code, and doubtless the trial court thought so. In any event, the defendant could not have been prejudiced by the court's ruling; for, before the defense was commenced, it was definitely stated that the prosecution was being conducted under section 3078, above.

Certain bounty claim certificates were introduced in evidence over the objection of the defendant, and it is urged that the ruling of the trial court was erroneous, for the reason that no proper foundation had been laid. It is said that the state was proceeding upon the assumption that these certificates were public records, while in fact they were not such. But irrespective of whether they were public records, in every instance the certifi-

cate offered was an original, and was properly identified by the parties who made the affidavits, by the county clerk who attached his certificate, and by proof of the signatures of the defendant to the jurats, and to the inspector's certificate.

A witness, J. L. Foster, was permitted to testify for the state, over the objection of the defendant, that his name was not indorsed on the information. It does not appear from the record whether this witness was known to the county attorney at the time the information was filed. Section 1734 of the Penal Code provides: "The county attorney must indorse upon the information at the time of filing the same the names of the witnesses for the state, if known." This section was considered in *State v. Sloan*, 22 Mont. 293, 56 Pac. 364, and *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927, and the question now raised by defendant, determined by this court adversely to his contention.

The defendant Newman was a bounty inspector in Custer county and was charged with forging a bounty certificate. There is not any conflict in the testimony. S. A. Hotchkiss, a resident of Custer county, took to the defendant, as bounty inspector, three coyote skins, in order to receive the bounty upon them. There seemed, however, to be a well-founded opinion prevalent that, instead of defendant performing the duties of his office, as required by law, he was engaged in trafficking in bounty claims; so that when Hotchkiss took these skins to the defendant, instead of proceeding according to law to secure the bounty, he merely sold to the defendant the bounty claims at a discount of forty-five cents on each, signed in blank the affidavit of the person killing the animals, and an assignment of the claim in blank, and received his money for the claims. The defendant himself solicited one Herman to sign the resident stockgrower's affidavit, and this was done, although Herman says himself that he did not even see the skins. Defendant then filled up the affidavits, and made his own certificate as inspector, in which he certified that Hotchkiss had presented for examination, and that he as such inspector had examined and properly marked, sixteen coyote skins. These papers were then taken to the

county clerk, who certified that Hotchkiss had presented the bounty inspector's certificate that sixteen coyote skins were marked as required by law, although, as a matter of fact, Hotchkiss had not seen the papers from the time he signed them in blank in Newman's place of business, until the time of the trial of this case in the district court. The assignment of the claims which Hotchkiss signed in blank was filled up, and the name of one Etna Western inserted as assignee of Hotchkiss, and a claim of \$48 on the state's bounty fund duly presented to the state board of examiners for allowance, although Hotchkiss' claim had amounted to but \$9, and this he had sold to the defendant for \$7.65.

For the purpose of showing that the insertion of the figure "16" instead of the figure "3" in the inspector's certificate, as designating the number of skins presented by Hotchkiss, was not the result of accident, mistake, or inadvertence, but done *malo animo*, the state, over the objection of defendant, offered evidence to show a general plan or system by which the defendant was operating. The evidence consisted of bounty claim certificates and testimony of witnesses, showing other like transactions by Newman about the same time that the one was had with Hotchkiss. For instance: Homer Lewis presented three coyote skins at Newman's place of business, and, although Newman was not present at all, sold the bounty claims to Newman through Newman's sister, who acted for him, signed an affidavit in blank and a blank assignment of the claims, had his witness sign the resident stockgrower's affidavit in blank, received \$2.50 or \$2.65 for each skin, and left, not having seen Newman at all. The affidavits of Lewis and his witness were filled up, and Newman attached his jurats as inspector, reciting in one instance that Lewis, and in the other his witness, had subscribed and sworn to the facts set forth in the respective affidavits before him, Newman. Newman then filled up his own certificate as inspector, reciting that Lewis had presented nineteen coyote and three wolf skins, and that he had examined and properly marked the same. The county clerk's certificate was procured, the blank

assignment filled up, and Etna Western named as assignee, and a claim for \$72 on the state bounty fund presented for allowance, although Lewis had received less than \$8 for his claims, which in any event could not have amounted to more than \$9.

John M. Smith went before Newman, signed a blank affidavit as of a person who had killed certain stock destroying animals, the skins of which were then presented to Newman as such inspector, signed in blank an assignment of the claim for bounty, and received \$13.65 for doing so, although as a matter of fact Smith had not presented any skins whatever for examination or marking. A resident stockgrower was procured to sign the affidavit, which, by reference to the inspector's certificate, in effect stated that Smith had presented eighteen coyote and two wolf skins, and to the best of the stockgrower's knowledge, information and belief the animals had been killed by Smith within sixty days preceding that date, and in Custer county. Newman then filled up these affidavits, and his own certificate as inspector recited that Smith had in fact presented to him as bounty inspector eighteen coyote and two wolf skins, and that he as such inspector had examined and marked the same as required by law. The county clerk's certificate was procured to be attached, the blank assignment of the claim was filled out, and Etna Western named as assignee, and a claim against the state bounty fund for \$64 duly presented.

Charles Hout presented the skins of two coyotes and one wolf to Newman as inspector, signed the affidavit and assignment of the claims in blank, had the stockgrower's affidavit made by one J. H. Daly, received \$2.40 for each claim for bounty on the coyote skins, and \$4 for the bounty claim of the wolf skin. Newman made out his certificate, as inspector, that Hout had presented fourteen coyote skins and one wolf skin, the assignment of the claims was made out, and Etna Western named as assignee of the claims, the county clerk's certificate procured, and a claim against the state bounty fund for \$47 duly presented, though the total amount of Hout's claim was but \$11, and this he had sold to the defendant for \$8.80.

Ralph Gilmore went before Newman, signed an affidavit as one who had killed certain stock destroying animals, told Newman that he had not any of the skins with him, but had them at his ranch, and would send them to Newman; and it was then agreed between Newman and himself that for whatever number of skins Gilmore did send, Newman would give him credit on account. The stockgrower's affidavit was made by one Hostetter. Gilmore afterward sent up to Newman three coyote skins. The defendant made out his certificate, in which he certified that Gilmore had presented sixteen coyote skins, and that he, as such inspector, had examined and marked the same as required by law. The assignment was filled up, and Etna Western named as assignee of the claim. The county clerk's certificate was procured, and a claim for \$48 presented to the state. It does not appear from the record for what amount Gilmore received credit.

The defendant urges that the introduction in evidence of the certificates showing these transactions, particularly the certificates showing the transactions other than the one with Hotchkiss, was error prejudicial to the defendant. With this contention we are not able to agree. It is a well-settled rule of the law of evidence that proof may be made by the state of facts tending to show a uniform course of action recently pursued—a system or plan on the part of the accused, for the purpose of showing guilty knowledge or criminal intent, and to negative the idea that the particular act with respect to which the accused is charged with committing a crime was the result of accident, mistake, or inadvertence. In 12 Cyc. 411, the rule is thus stated: "Where the crime charged is part of a plan or system of criminal action, evidence of other crimes near to it in time and of similar character is relevant and admissible to show the knowledge and intent of the accused, and that the act charged was not the result of accident or inadvertence," and numerous decisions are cited in support of the text. (See, also, 1 Wigmore on Evidence, sec. 304; Underhill on Criminal Evidence, sec. 423.)

The defendant in his own behalf offered to show that

he was a furrier and taxidermist; that while acting as bounty inspector he had purchased from parties who had killed the animals the skins of coyotes and wolves upon which bounty had not been paid; and that by agreement with Hotchkiss he, Newman, had properly marked thirteen coyote skins of his own which he had theretofore purchased, and had included them in his certificate as having been presented to him by Hotchkiss; that his transaction with Hout was had under a like agreement; and that as to the claims of Lewis, Smith and Gilmore, he had not in any wise included in his certificates any "skins which were not bountable in any wise." These offers were made to negate any criminal intent on the part of the defendant, and to show that in fact he did not intend to commit a crime or wrong, or defraud the state or anyone else; and exception is taken to the ruling of the court excluding these offers.

An analysis of these offers shows that, according to the defendant's own statement as contained in the offers, in addition to being guilty of the crime for which he was being tried, he was likewise guilty of subornation of perjury, if he procured Hotchkiss to swear that he, Hotchkiss, had killed sixteen coyotes, and had presented these skins to Newman as bounty inspector, when in fact Hotchkiss had killed but three, and had presented but three skins. (Political Code, sec. 3078.) He was also guilty of a felony in purchasing these claims against the state. (Penal Code, sec. 136.) He was likewise guilty of perpetrating a fraud upon the state in presenting for bounty and procuring the payment of bounty, upon skins for which no bounty could be collected by law. It is perfectly clear from section 3071 of the Political Code, as amended by Act of March 6, 1903 (Laws of 1903, p. 166, Chapter XCIV), that the state's bounty is only given to the party himself who kills a stock destroying animal, and if any such party sold the skin of the animal to Newman, he thereby waived his right to claim the bounty, and from that moment the state was not liable for bounty on such skin. In attempting to collect it, Newman was attempting to defraud the state out of the amount of such bounty. So, instead of defend-

ant's offers of proof tending in the remotest degree to excuse him, they convicted him of numerous other crimes. If the evidence offered had been received, the court must have instructed the jury that the facts which the evidence tended to prove, if considered proved, would not constitute any defense.

Complaint is made of certain instructions given by the court, and of the refusal of the court to give certain other instructions requested by the defendant. None of these instructions are set forth in the brief of appellant, as required by subdivision "b," paragraph 3, Rule X, of the Rules of this court (30 Mont. xxxviii, 82 Pac. x), and, under the practice uniformly followed, these assignments will not be considered.

We have examined the other assignments made by appellant, but we do not find anything in them which would justify this court in interfering with the verdict of the jury or the judgment of the court. The evidence is amply sufficient to sustain the judgment. The defendant appears to have had a fair trial.

The judgment and the order are affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN: I dissent for the reasons stated by me in *In re Terrett*, ante, p. 325, 86 Pac. 266. The defendant is not, in my opinion, guilty of *forgery*.

GILCHRIST, RESPONDENT, v. HORE ET AL., DEFENDANTS. E.
MEYER, APPELLANT.

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39 361

(No. 2,290.)

(Submitted October 8, 1906. Decided October 29, 1906.)

Attorney's Lien—Foreclosure—Pleading and Practice—Evidence—Exclusion—Statutes.

Attorney's Lien—Foreclosure—Prior Mortgage—Tender—Complaint.

1. The complaint in a suit to foreclose an attorney's lien on property upon which a prior mortgage was outstanding need not allege that tender of payment of the mortgage lien had been made to the mortgagee, since such tender is not a condition precedent to the bringing of a suit in foreclosure of the attorney's lien.

Same—Pleading and Practice—Evidence—Exclusion.

2. In an action by an attorney to foreclose an attorney's lien which he had acquired on certain lands, one of the defendants answered, affirmatively setting forth that she had a prior mortgage on the premises and asking that it be foreclosed. Plaintiff filed a reply alleging that defendant had had the use of the property and had received rents and profits from it to the amount of \$1,000. On the trial the answering defendant offered proof that she had only received \$450 in rents. Plaintiff objected on the ground that defendant's pleading was a cross-complaint, and that his reply was an answer which required a reply, and that by her failure to file such reply the receipt by her of \$1,000 in rents had been admitted. *Held*, that the only pleading of facts permitted under the Code on the part of defendant being an answer, on the part of plaintiff thereafter a reply, any new matter in which is deemed denied, the court erred in excluding the offered testimony.

Counterclaim—Pleading—Statutes.

3. *Held*, that section 981 of the Code of Civil Procedure, providing that where a defendant interposes a counterclaim and demands affirmative relief against the plaintiff, his right to the relief is the same as in an action against the plaintiff directly, and that the defendant shall be deemed plaintiff and the plaintiff the defendant, is applicable only to Title VII, which has to do with provisional remedies in civil actions and not with questions of pleading, controlled by Title VI of that Code.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by M. P. Gilchrist against Jeremiah Hore and others. From a judgment in favor of plaintiff, defendant Elizabeth C. Meyer appeals. Remanded.

Messrs. Maury & Hogevoll, for Appellant.

Mr. William D. Kyle, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

M. P. Gilchrist commenced this action against Jeremiah Hore to foreclose an attorney's lien upon lot 10, block 6, Barnard's addition to Butte, and made Elizabeth C. Meyer a party defendant, alleging in his complaint that she had or claimed some interest in the property. The defendant Hore defaulted. The defendant Meyer filed a demurrer, which was overruled. She then answered, admitting the allegations of the complaint, and affirmatively set forth that she had a mortgage upon the property sought to be sold for \$1,785.13 and \$316 accrued interest; that she had paid out for taxes and repairs upon the property \$347.80; that \$250 was a reasonable attorney's fee to be allowed her in foreclosing her mortgage, and that the lien of her mortgage was prior and superior to any claim of the plaintiff. She asked that her mortgage be foreclosed. The plaintiff filed a reply in which he disputed some of the items claimed by her. He further alleged that defendant Meyer had received rents and profits from the property amounting to \$1,000, and had had the use of certain portions of the property herself, and that such use was reasonably worth \$400. The reply admits that the lien of the defendant Meyer is prior and superior to the lien of plaintiff.

The cause was tried to the court without a jury. The court found that the defendant Meyer had been in possession of the property in controversy from October 20, 1903, to July 28, 1905, and that during that time she had received in rents from the property \$1,000. The court found that the balance due her, including attorney's fee for foreclosing her mortgage, was \$1,616.06. A decree was rendered and entered, adjudging defendant Meyer's lien superior to plaintiff's, directing the sale of the property, and the proper application of the proceeds.

From this decree, the defendant Meyer appealed. The evidence is presented in a bill of exceptions.

The errors specified are (1) that the court erred in excluding from consideration all testimony offered tending to show the amount defendant Meyer had actually received in rents from the property from October 20, 1903, to July 28, 1905; (2) the court erred in rendering a decree in favor of the plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action. The third and fourth specification each raises the same question as the first, and the fifth the same as the second.

1. Does the complaint state a cause of action? The complaint is in the usual form in foreclosure. But counsel for appellant contend that it is insufficient, in that it fails to state that any tender had been made to appellant of the amount due her on her prior mortgage. It is entirely immaterial that plaintiff's lien had its inception in services rendered in an action by Hore against Meyer (formerly Whitney) to have a certain instrument, on its face a deed, declared to be a mortgage. An attorney's lien is given by statute. (Code Civ. Proc., sec. 430.) Gilchrist was not in any sense a successor in interest of Hore. He merely acquired a lien upon Hore's property upon which Meyer had a prior mortgage lien. The situation was not different at all from what it would have been had Hore given Gilchrist a second mortgage upon the property to secure the payment of his attorney's fee. In commencing an action to foreclose such a second mortgage, it could hardly be contended that Gilchrist would have been compelled to pay or tender payment of the amount of the first mortgage as a condition precedent to foreclosing his second mortgage. There is not anything in this contention.

2. In his reply the plaintiff alleged that the defendant Meyer had received \$1,000 in rents from the property from October 20, 1903, to July 28, 1905. When the defendant Meyer offered evidence tending to show that she had received only about \$450, objection was made by plaintiff that, by failure to reply to his

reply, defendant Meyer had admitted that she had received the sum of \$1,000 as alleged in the reply. The court admitted the evidence subject to the objection, with the statement that, if it decided that a reply on the part of the defendant Meyer was necessary, the evidence offered by her would not be considered. There is not anything in the record in terms which discloses what the court's final ruling upon the matter was, but from the fact that the court found that defendant Meyer had received in rents the full sum of \$1,000, as alleged in plaintiff's reply,—a finding not supported by the evidence at all,—it becomes apparent that in fact the court did hold that the allegation in plaintiff's reply was admitted, and that the evidence tending to show the exact amount received had been excluded from final consideration.

The position of plaintiff in the trial court was that the pleading by which defendant Meyer set forth her claim for the foreclosure of her mortgage was in fact a cross-complaint, and that plaintiff's pleading putting in issue certain allegations therein and setting up affirmative matter was in fact an answer which required from the defendant Meyer a reply, or, in the absence of such a reply, the affirmative allegations were admitted. But this position is not maintainable at all. "The Code establishes the law of this state respecting the subjects to which it relates." (Code Civ. Proc., sec. 3453.) Section 661 of the same Code provides: "The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings are to be determined, are those prescribed in this Code." Section 662 provides: "The only pleadings allowed on the part of the plaintiff are: (1) The complaint. (2) The demurrer to the answer. (3) The reply to defendant's answer. And on the part of the defendant: (1) The demurrer to the complaint. (2) The answer. (3) The demurrer to reply."

The only pleading of facts on the part of the defendant, then, is the answer, and this is so irrespective of whether the action is one at law or in equity, for there is now but one form of civil action known to our law. (Section 460.) The answer

may consist of (1) denials, and (2) statements of new matter. The new matter may constitute a defense or a counterclaim. (Section 690.) When a cause is tried, judgment may be given which determines the ultimate rights of the parties on each side as between themselves. (Section 1001.) And this being so, and an answer being the only pleading of facts permitted on the part of a defendant, it must be apparent that a cross-bill or cross-complaint is not known to our practice, but that an answer under our Code affords a defendant every opportunity for relief which a cross-bill or cross-complaint could have secured to him. No matter, then, what form the answer assumes, it is nevertheless an answer, and the only pleading of facts on the part of the plaintiff thereafter is a reply. In such reply the plaintiff may allege any new matter, not inconsistent with the complaint, constituting a defense to the counterclaim or new matter in the answer. (Laws 1905, Chapter V, p. 8.) But every allegation of new matter in a reply is deemed denied. (Code Civ. Proc., sec. 754.)

And in this case no matter what the defendant Meyer may have called that portion of her pleading in which she sought foreclosure of her mortgage, it was in fact a part of her answer, and the pleading of fact thereafter filed by the plaintiff, no matter by what term designated, was in fact a reply, and every allegation of new matter in it was deemed denied. It was the last pleading of facts authorized by our Code. These conclusions appear plain upon principle from the language of the Code itself. They do, however, find support in the decisions of other courts treating similar Code provisions. (*Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776; *Hughes v. Durein*, 3 Kan. App. 63, 44 Pac. 434.)

Counsel for respondent refers to section 981 of the Code of Civil Procedure, and suggests that it may modify section 662 above. But the provisions of section 981 are by express terms applicable only to Title VII of that Code, and that title has to do with provisional remedies in civil actions, and not questions of pleading, which are controlled by Title VI of the same Code.

It is apparent from finding No. 5 that the trial court refused to consider the evidence offered by the defendant Meyer to show the amount of rents received by her from the property, but must have held that the allegation in plaintiff's reply that the amount was \$1000 was admitted. In this the court erred.

The cause is remanded to the district court, with directions to hear proof and determine the amount of rents received by the defendant Meyer from the property, and to make such modification in the decree as may be justified by the finding upon the matter so considered.

Remanded.

MR. CHIEF JUSTICE BRANTLY, and MR. JUSTICE MILBURN concur.

STATE EX REL. BRAY, APPELLANT, v. SETTLES, COUNTY TREASURER, RESPONDENT.

(No. 2,326.)

(Submitted October 5, 1906. Decided October 29, 1906.)

Mandamus—Intoxicating Liquors—Licenses—Statutes—Constitutionality.

Mandamus—County Treasurers—Intoxicating Liquors—Licenses.

1. *Mandamus* does not lie to compel a county treasurer to issue a license to a liquor dealer who, after the expiration of a license obtained under Chapter 82 of the Session Laws of 1905, page 174, tendered the necessary license fee and demanded that a new license be issued to him to carry on the business at the same place for the ensuing six months, his contention that, having once had favorable action on his petition for such a license by the board of county commissioners, he was not required thereafter at any time to present a new petition signed by the requisite number of resident freeholders, and that therefore it was the duty of the county treasurer to issue a new license on demand, being untenable.

Intoxicating Liquors—Legislative Regulations—Licenses.

2. The legislature, in regulating the sale of intoxicating liquors, may impose any restrictions it may deem proper upon those engaged in such business, and the argument of inconvenience will not avail so long as any such regulation bears equally upon all persons falling in his particular class.

Same—Statutes—Constitutional Objections.

3. Chapter 82, Session Laws of 1905, page 174, is not obnoxious to constitutional principles, in that it grants to the board of county

commissioners authority to act capriciously in the matter of granting or refusing licenses to sell intoxicating liquors, the discretion in that Act conferred upon them being a fair administrative one, and the mere fact that the power vested in them may be abused being no valid objection to the legislation.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

MANDAMUS by the state, on relation of M. H. Bray, to compel W. M. G. Settles, as county treasurer of Lewis and Clark county, to issue a liquor license to relator. From a judgment dismissing the proceedings, he appeals. Affirmed.

Mr. C. B. Nolan, for Appellant.

It was not the intention of the legislature that these petitions for liquor licenses should be presented every six months. In construing a statute all of the language should be given effect if possible. (*State ex rel. Knight v. Cave*, 20 Mont. 468, 52 Pac. 200. See, likewise, *Perkins v. Guy*, 2 Mont. 15; *Hope Min. Co. v. Kennon*, 3 Mont. 35; *Lane v. Commissioners of Missoula County*, 6 Mont. 477, 13 Pac. 138.)

While it is true that no vested right exists to engage in the business of retailing liquors, the statute in question is obnoxious to constitutional principles in granting to the county commissioners authority to act capriciously. (*Bessonier v. Indianapolis*, 71 Ind. 189; *Richmond v. Dudley*, 129 Ind. 112, 28 Am. St. Rep. 180, 28 N. E. 312, 13 L. R. A. 587; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758, 42 L. R. A. 696; *Noel v. People*, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616, 52 L. R. A. 287; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Sioux Falls v. Kirby*, 6 S. Dak. 62, 60 N. W. 156, 25 L. R. A. 621; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.)

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondent.

A state, in the exercise of its police power, may entirely prohibit all liquor traffic within its borders. (Cooley's Constitutional Mont., Vol. 34—29)

Limitations, 7th ed., p. 845; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929.) And this prohibition may even extend to original packages imported from another state or country. (*May v. New Orleans*, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165; *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; Freund on Police Power, sec. 81.) If a state has the power to prohibit, it may regulate and control. A statute which gives to freeholders a right to say whether a saloon may be established in their midst confers upon such freeholders a power and authority which may be exercised arbitrarily or capriciously; still such statutes are constitutional. (*Metcalfe v. State*, 76 Ga. 308; *State v. Weber*, 20 Neb. 467, 30 N. W. 531; 17 Am. & Eng. Ency. of Law, 249; Freund on Police Power, secs. 645, 652.) A statute which confers upon a city authority to prohibit or regulate the liquor traffic within its boundaries gives to such city a power which may be used capriciously, yet such statutes are constitutional. (*State v. Harper*, 42 La. Ann. 312, 7 South. 446; *Florence v. Brown*, 49 S. C. 332, 26 S. E. 880, 27 S. E. 273; 17 Am. & Eng. Ency. of Law, 225. See, also, *Savage v. Virginia*, 84 Va. 582, 619, 5 S. E. 563, 565.)

With reference to the discretionary power relating to the issuing of licenses, see *People v. Grant*, 126 N. Y. 473, 27 N. E. 964; *Armstrong v. Murphy*, 65 App. Div. 123, 72 N. Y. Supp. 473; Freund on Police Power, sec. 652.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Mandamus. On or before September 9, 1905, the appellant (relator) "filed and presented to the board of county commissioners" of Lewis and Clark county a petition signed by twenty freeholders residing in the village of Wolf Creek in said county, asking that a license be issued to him permitting him to carry on the business of a retail liquor dealer at Wolf Creek for six months, said village having a population of less than one hundred. After considering the petition, the board ordered the county treasurer to issue the license, and that officer did so under

date of September 9, 1905, upon payment of \$165, this sum being fixed by the statute (Chapter 82, p. 174, Laws of 1905, sec. 1) as the amount to be paid semi-annually for such license. On March 9, 1905, the day the license expired, the relator tendered \$165 to the county treasurer, and demanded a license to be issued to him to carry on the same business at the same place for the six months beginning on that day. The treasurer refused to grant the demand without an order of the board of commissioners directing him to do so. This action was then begun to compel the issuance of the license. The district court issued an alternative writ. The defendant showed cause by demurrer, which upon consideration the court sustained, dismissing the proceedings and rendering judgment for defendant for costs. Thereupon the relator appealed.

The contention is that it was the duty of the treasurer, under the provisions of Chapter 71, page 154, of the Laws of 1905, to issue the license on demand, because the appellant, having once presented his petition to the board of county commissioners, was not required thereafter at any time to present a new petition or to have any action thereon by the board. The Act referred to is entitled: "An Act to Regulate the Issuance of Licenses of Retail Liquor Dealers in Cities, Towns, Villages or Camps containing a Population of less than one hundred"; and whether the appellant's contention is maintainable depends upon what construction is to be given to it.

Section 1 of the Act, after declaring that all retail liquor dealers in all cities, towns, villages, or camps, etc., having a population of less than one hundred shall obtain a license from the county treasurer, proceeds: "But before the county treasurer shall be permitted to issue such license, petition shall first be filed and presented to the board of county commissioners of the county, signed by at least twenty freeholders residing within the particular city, town, village, camp, or township in which any person seeking such a license, intends to engage in business, requesting the issuance of such license to such person, and they

shall in their discretion thereupon direct the county treasurer to issue such license, but not otherwise."

Section 2 lodges the matter of directing the license to issue entirely in the discretion of the board of county commissioners.

Section 3 provides for the revocation of such license, and specifies the circumstances under which the revocation may be made.

Counsel for appellant bases his contention upon the words "intends to engage in business," found in section 1 quoted *supra*, and argues that one already engaged in business cannot entertain an intention to engage in it, and therefore the use of the word "intends" precludes the idea that after a license has once been issued, an applicant for another license at the expiration of the term for which he has already been licensed, shall again apply to the board for an order. It is manifest, however, from reading the Act, that it was the intention of the legislature to prohibit specially the sale of intoxicating liquors in the class of communities mentioned in all cases, except where the people residing in them should give their consent. For unless this were the purpose, the Act could not apply to a person already engaged in the business at the time of the passage of the Act; and we may not conclude that the legislature intended it to apply only to persons about to engage in it in those communities where no such business was then being carried on. "In the construction of a statute the intention of the legislature * * * is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. * * * So a particular intent will control a general one that is inconsistent with it." (Code Civ. Proc., sec. 3135.)

We think the general intention of the legislature is manifest, and that the loose use of the word "intends" in the recital, upon which appellant founds his contention, cannot be held to be an expression of a particular intent which will control and in great measure render the Act nugatory. Literally interpreted, the word "intends" conveys the idea contended for by appellant; but we think it apparent that its use was the result of hasty

and careless work on the part of the person who drew the bill, rather than that it is the expression of a well-defined intention on the part of the legislature to limit its operation. It renders the Act somewhat ambiguous, but the ambiguity must be resolved in favor of that construction which will render the Act uniform in its operation in all localities to which it was intended to apply.

And it can be no serious objection to the Act as a whole, that it renders it exceedingly inconvenient for persons intending to obtain a second license, to apply to the board of county commissioners, for the reason that licenses expire at different dates, and that the board is not always in session, or that, in order to accommodate those engaged in such business, it must hold special meetings at the expense of the county. It is entirely within the province of the legislature, in the exercise of the police power of the state to regulate the sale of intoxicating liquors and to impose such restrictions upon those engaged in the business as will carry out its purpose. "The right to manufacture and traffic in intoxicating liquors is one which is exercised subject to the regulation and control of the police power of the state; a power of which the legislature cannot divest itself; and such body is the exclusive judge of the manner in which such police power shall be exercised, and its action thereon should be liberally construed." (*In re O'Brien*, 29 Mont. 545, 75 Pac. 200.) Any regulation of it is an inconvenience to the dealer, but no matter what inconvenience may be imposed upon him by the legislature, so long as it bears equally upon all persons falling in his class, he has no right to complain.

Counsel says that the legislation is obnoxious to constitutional principles, in that it grants to the board of county commissioners authority to act capriciously. The discretion referred to in section 2 of the Act must be construed to be a fair administrative discretion. The Act does not in terms nor does it impliedly authorize the board to act capriciously or arbitrarily. The fact that it may so act is no objection to the validity of the statute, because wherever discretion in a particular matter is lodged in

any judicial or administrative officer, he may be guilty of an abuse of it; but the fact that he may abuse the power vested in him is no valid objection to the legislation which vests the power.

Let the judgment of the district court be affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

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36	541

MAHONEY, APPELLANT, v. DIXON ET AL., RESPONDENTS.

(No. 2,295.)

(Submitted October 9, 1906. Decided November 5, 1906.)

Notaries—False Certificate—Evidence—Instructions—Reading Law to Jury—Failure of Proof.

Notaries—False Certificate—Evidence—Cross-examination.

1. In an action against a notary and the sureties on his official bond, for falsely certifying an acknowledgment to a mortgage on the security of which plaintiff had advanced money, plaintiff was asked on direct examination whether he had any interest in the note and mortgage, both of which ran to another person. Plaintiff answered in the affirmative. On cross-examination he was asked why the mortgage had been made to such other person. An objection was overruled and the witness replied that it was done to avoid his having to pay taxes on the mortgage. *Held*, that the evidence was proper cross-examination, and admissible for the purpose of affecting the credibility of the witness.

Same.

2. On direct examination plaintiff, in an action against a notary and the sureties on his official bond for damages consequent upon a false certification of an acknowledgment to a mortgage, was asked to state what, if any, efforts he had made with a view to recover the amount of money he had advanced on the mortgage. He replied that he had endeavored to secure it from one R., who had introduced the mortgagor to the notary, and failing in this he had approached the notary with a like demand. On cross-examination he was asked whether R. or his partner had made any offers of settlement. An objection having been overruled, he replied that he could not recollect that any efforts [offers] were made. *Held*, that the question was proper cross-examination, and that in any event no prejudice could have resulted from the answer.

Same—Instructions—Naming Witnesses—When not Reversible Error.

3. In an action against a notary for damages for falsely certifying to an acknowledgment of a mortgage, the testimony taken at a former

trial of the cause was introduced to impeach plaintiff and his wife. Their statements on the second trial in certain respects were in direct conflict with those made at the first trial. The only other witness at the second hearing who had also testified at the first admitted the correctness of his former testimony and gave none contrary thereto. The court instructed the jury that in determining the weight to be given to the testimony of plaintiff and his wife they could consider their statements made at the first trial, if they should find that such prior testimony had been given. *Held*, that while a court should not in any case designate a witness by name in its instructions, in this instance prejudice to appellant (plaintiff) could not have been worked, because, even if the witnesses had not been particularly designated, the instruction could not have been understood as being applicable to anyone but plaintiff and his wife.

Attorneys—Argument to Jury—Reading Law.

4. *Semble*: Whether an attorney in an argument to the jury may read excerpts from an opinion rendered by the supreme court on an appeal of a civil cause then on trial for the second time, seems to rest in the sound discretion of the court, and its action in permitting it to be done is not reversible error so long as the portions read do not state or comment on the facts, or disclose what the result of the first trial or the appeal had been.

Notaries—False Certificate—Attorneys—Argument—Reading Law to Jury.

5. Where, in an action against a notary for damages flowing from a false certificate to an acknowledgment of a mortgage, it was contended by defendants that plaintiff's testimony as to the reliance he had placed on the certificate before he loaned his money was in direct conflict with his statements made on a former trial of the cause, and counsel for defendants in his argument read to the jury a portion of the opinion of the supreme court rendered in the same case on appeal, to the effect that if plaintiff had not relied on the correctness of the certificate he could not recover,—with the apparent purpose of illustrating to the jury why it had become necessary for plaintiff to change his testimony in this respect,—the court did not abuse the discretion lodged in it in permitting the reading of the excerpt in question.

Same—Appeal—Verdict Against Evidence—Failure of Proof.

6. The verdict for defendants in an action against a notary on his official bond for falsely certifying to an acknowledgment of a mortgage was not open to the objection that it was not justified by the evidence, where the only testimony of the transaction on the part of plaintiff was that of himself and wife, which was contradictory of their respective stories given at a former trial of the cause, a fact which the jury were at liberty to take into consideration on the question of their credibility; and if their testimony on the second trial was disregarded, there was an entire failure of proof, and the verdict for defendants was proper.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Edward L. Mahoney against John M. Dixon and others. From a judgment in favor of defendants and from an order denying him a new trial, plaintiff appeals. **Affirmed.**

Mr. John J. McHatton, for Appellant.

The court was not justified in allowing counsel to refer to the opinion of this court on the former appeal, or to read excerpts therefrom. There is no warrant in our practice for the same. Under our statute and under our practice only such matters as have been admitted in evidence before a jury are proper matters for discussion by counsel. The reading amounted to introducing the portion of the opinion read as testimony in the case. An opinion of the supreme court is not its decision, and is not even admissible in evidence to prove the decision. (*Appeal of Buckingham*, 60 Conn. 142, 22 Atl. 511; *Robinson v. New York etc. R. Co.*, 64 Hun, 41, 18 N. Y. Supp. 728.) Counsel had no right to read the opinion to the jury. (*Appeal of Baldwin*, 44 Conn. 37; *Douglass v. Boynton*, 59 Ga. 283; *Hudson v. Hudson* (Ga.), 16 S. E. 349; *Onley v. Boston Elec. Ry. Co.* (N. H.), 59 Atl. 387; *Ray v. Chesapeake Ry. Co.* (W. Va.), 50 S. E. 413; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *City of Chicago v. McGivern*, 78 Ill. 347; *Johnson v. Culver* (Ind.), 19 N. E. 129; *Steffenson v. Chicago etc. Ry. Co.* (Minn.), 51 N. W. 610; *Geo. Knapp & Co. v. Campbell* (Tex.), 36 S. W. 765; *Muller v. Reinig* (Wis.), 39 N. W. 861; *Filley v. Christopher* (Wash.), 80 Pac. 834; *Good v. Mylin*, 13 Pa. St. 539; *Phoenix Ins. Co. v. Allen*, 11 Mich. 512; *State v. Whit*, 5 Jones (N. C.), 224, 72 Am. Dec. 533.)

The reference of counsel for plaintiff to the opinion is not correctly stated; but if so, it does not cure the error any more than a cross-examination cures an erroneous admission of evidence. The conduct of counsel and the language expressed in connection with the above matter and the argument to the jury were such as to entitle the plaintiff to a new trial. (*Lawlor v. Kemper*, 20 Mont. 13; *Hayne on New Trial and Appeal*, p. 154 et seq., sec. 50; *Lindsay v. Pettigrew* (S. Dak.), 52 N. W. 873; *Cleveland Paper Co. v. Banks* (Neb.), 16 N. W. 833; *Henry v. Sioux City Ry. Co.* (Iowa), 30 N. W. 630, notes; *Rice on Evidence*, 129; *Waldron v. Waldron*, 156 U. S. 361; *People v. Fielding*, 158 N. Y. 542, 46 L. R. A. 641.)

The transcript of the proceedings on the former trial was not admissible in evidence. (*People v. Considine*, 105 Mich. 149, 63 N. W. 196; *State v. Cooper*, 83 Mo. 698; *State v. Adams*, 78 Iowa, 292, 43 N. W. 194. See, also, Chase's Stephens' Digest of Evidence, 328, note; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; Jones on Evidence, sec. 346, note 10; Rice on Evidence, 399; *Pennsylvania Co. v. Marien*, 123 Ind. 415, 7 L. R. A. 687; *Stearn v. People*, 102 Ill. 540.) The latter cases go to the point that a bill of exceptions, containing the testimony of a witness given on a former trial, is not competent to impeach him.

Any instruction which calls particular attention to any witness, or any part of the testimony, invades the province of the jury. (*State v. Irwin* (Idaho), 71 Pac. 608, 60 L. R. A. 716; *Knowles v. Nixon*, 17 Mont. 473; *Wastl v. Montana Union Ry. Co.*, 17 Mont. 216; *Hamilton v. Great Falls Ry. Co.*, 17 Mont. 343, 344; *State v. Schnepfel*, 23 Mont. 526.)

Mr. Charles R. Leonard, Mr. William M. Bickford, and Mr. Lewis P. Forestell, for Respondents.

"It is proper to read that part of the opinion rendered on a previous appeal laying down the law applicable to the case, care being taken not to state the result of the former trial." (1 Blashfield's Instructions to Juries, sec. 166; *Power v. Harlow*, 57 Mich. 107, 23 N. W. 606; *Panama Ry. Co. v. Johnson*, 63 Hun, (N. Y.), 629, 17 N. Y. Supp. 777.) The decision of the supreme court upon questions directly involved and considered upon a former appeal is the law of the case. (*Finlen v. Heinz*, 32 Mont. 354, 366, 80 Pac. 919; *Mahoney v. Butte Hdw. Co.*, 27 Mont. 463, 71 Pac. 674; *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439. See, also, *People v. Anderson*, 44 Cal. 70; *Gallagher v. Town of Buckley*, 31 Wash. 380, 72 Pac. 79; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439; *Baltimore etc. Ry. Co. v. Kean*, 65 Md. 394, 5 Atl. 325; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875; *Boltz v. Town of Sullivan*, 101 Wis. 608, 77 N. W. 870; *Allaire v. Allaire*, 39 N. J. L. 113, 114; 2 Ency. of Pl. & Pr. 709, and cases cited; Abbott's Trial Brief, Civil Jury Trials,

2d ed., p. 402, and cases cited. As to the latitude allowed counsel in his argument, see *Tucker v. Henniker*, 41 N. H. 323; *Gilbertson v. Miller M. & S. Co.*, 4 Utah, 46, 5 Pac. 699; *Gregory's Adm'x. v. Ohio River Ry. Co.*, 37 W. Va. 606, 16 S. E. 819; *Hastings v. Northern Pac. R. R. Co.*, 53 Fed. 224.)

A transcript of the testimony on a former trial may be introduced, although not certified to, when the stenographer testifies that he took the notes in shorthand and transcribed them and that the transcript is correct. (*People v. Morine*, 61 Cal. 367, 372, 373; *Jones v. Ward*, 3 Jones, 24, 64 Am. Dec. 590; *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621; *Chicago R. I. & P. Ry. Co. v. Harmon*, 16 Ill. App. 31, 17 Ill. App. 640. See, also, *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681; *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444, 445; *Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54. See, also, 26 Am. & Eng. Ency. of Law, 2d ed., 781, and cases cited, note 7; *Jones on Evidence*, 346; and cases cited.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This cause was heretofore before this court, and a sufficient statement of the case will be found preceding the opinion. (*Mahoney v. Dixon*, 31 Mont. 107, 77 Pac. 519.) Upon the new trial the jury returned a verdict in favor of the defendants and judgment was entered accordingly. From that judgment and order denying him a new trial the plaintiff appeals.

The assignments of error which need be considered are: (1) Errors in the admission of evidence; (2) the giving of instruction No. 12; (3) misconduct of counsel; and (4) insufficiency of the evidence to justify the verdict.

1. On the direct examination of plaintiff his counsel made this observation: "I observe that this note and mortgage were made to George H. Cotter"; and then asked this question: "You may state whether or not you had any interest in the note and mortgage?" to which the plaintiff replied: "Yes, sir, I had. The money was mine, and I had it made out that way for

my use and benefit.” On cross-examination he was asked to state why Cotter was named as mortgagee. Objection was made to this question, but the objection was overruled, and the witness answered: “In order that I would not have any taxes to pay on it.” Counsel for plaintiff moved that the answer be stricken out, but the motion was overruled. We think the evidence was admissible as proper cross-examination (Code Civ. Proc., sec. 3376), and for the purpose of affecting the credibility of the witness. (Section 3144.)

On direct examination the plaintiff was asked to state what, if any, investigation he made with a view to recovering his money. He answered that he had Reek brought back for the purpose of seeing whether he could get his money out of Reek, but found he could not, and then saw Dixon and told Dixon he would look to him for it. On cross-examination plaintiff was asked whether any offers had been made to him by Reek or Reek & Churchill or in their behalf. This was objected to as not cross-examination, but the objection was overruled, and the witness answered: “I do not recollect that there were any efforts [offers] made.” There was no error in the court’s ruling. It was proper cross-examination, and, if it had not been, the answer discloses that no prejudice resulted.

2. Instruction No. 12 given by the court is as follows: “Instruction No. 12. You are instructed that in determining the weight to be given to the testimony of the plaintiff and of Mrs. Mahoney, you can consider the testimony given by them in the former trial of this case, which has been produced in evidence in this cause, if you find such prior testimony has been given, and in that connection you have a right to compare the testimony given on the former trial, as established in this cause, with the evidence which was given in this hearing, for the purpose of determining the weight to be given to the testimony of such witnesses.”

The objection made to this instruction is that it singles out by name certain witnesses, and makes the rule of law announced applicable to them only. It is a general rule that: “Where

there are several witnesses testifying to a particular hypothesis of fact, it is error for the court, in instructing the jury, to single out a particular witness, and direct their attention to his testimony, either in the way of disparagement, as where the court gives in respect of a particular witness the familiar direction explaining the maxim, '*Falsus in uno, falsus in omnibus*,' or where, by singling out the testimony of a witness, the tendency of the instruction is to leave the jury to attach undue importance to it." (*Hartman v. Louisville etc. Ry. Co.*, 39 Mo. App. 88.) This is in effect the decision of this court in *Wastl v. Montana U. Ry. Co.*, 17 Mont. 213, 42 Pac. 772.

But if the witnesses so designated are the only ones to whom the rule could possibly be applicable, it is quite generally held that the giving of such an instruction will not constitute reversible error. (*Shaw v. State*, 102 Ga. 660, 29 S. E. 477; *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972.) With respect to this, the Missouri court above further said: "Mr. Sample was the only witness for the defendant who testified to the existence of the special direction or to its terms. It was from his lips alone that the language of the direction, as he recollected it, was delivered. The language in which the instruction was drawn, then, in so far as it alluded to the 'directions such as witness Sample testified to,' was merely a method of identifying that element of the defendant's evidence. The instruction had no tendency to disparage the testimony of that witness." (*Hartmann v. Louisville etc. Ry. Co.*, above.) And it was held to be reversible error for the trial court in that case to refuse the instruction mentioned, although the witness Sample was therein designated by name. In *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23, the court seemed to be of the opinion that such an objection to an instruction is not tenable in any event.

We are not now prepared to go further than to say that we deem it bad practice in any case for a court in its instructions to designate a witness by name; and, if the case presented comes within the general rule announced above, the error will be deemed sufficient to work a reversal. But, in this instance, the

plaintiff and Mrs. Mahoney were the only witnesses to whom the rule could in any event be made applicable. Confessedly, there was a direct conflict between the testimony given by each of these witnesses on the second trial and what the defendants claimed was their testimony given on the first trial. It was properly left to the jury to determine whether in fact these witnesses had testified upon the first trial, as the defendants contended they had.

The evident purpose of introducing what the defendants claimed was the testimony given at the first trial by these witnesses was to impeach them, by showing that they had made statements on the first trial contradictory of their testimony on the second trial. (Code Civ. Proc., sec. 3380.) No other witness at the second trial testified at the first trial, except the witness Leonard, and the record fails to disclose any attempt whatever to impeach him. In fact, there was not any material portion of his testimony given at the first trial called to his attention on the second trial, and in every instance where it was done, he admitted the correctness of his former testimony and did not testify to anything on the second trial contrary thereto. So that, if the court had properly drawn this instruction, omitting the names of the witnesses, and making it general in its application, the jury could not have understood the instruction as applicable to anyone but the plaintiff and Mrs. Mahoney. Under these circumstances we think the giving of this instruction did not work any prejudice to the appellant. (*Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860.) In *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927, and in *State v. Jones*, 32 Mont. 442, 80 Pac. 1095, it was held not to be error for the trial court to refuse an instruction in which a witness was designated by name.

3. In the course of his argument to the jury one of the attorneys for the defendants read a portion of the opinion of this court in this same case on appeal, as follows: "If, in fact, the plaintiff did not rely upon the statements contained in the notary's certificate, then the mere fact of the notary's violation of

his official duty could not have been the proximate cause of plaintiff's injury. It was necessary for the plaintiff to allege, as he did, that he did rely upon such certificate, but this allegation is put in issue by the answer. It was therefore necessary to be supported by the proof, and considered and passed upon by the jury."

The right of plaintiff to recover depended upon his having relied upon the certificate of the notary in making the loan. Defendants contended upon this trial that upon the first trial Mahoney had testified that he did not see the mortgage until after the money was paid over to Reek on January 11th, and that Mrs. Mahoney had given somewhat similar testimony. Upon the second trial, Mahoney testified that Reek brought the mortgage, duly executed with Dixon's certificate attached, to his (Mahoney's) residence on the evening of January 10th, and that he read the mortgage and the notary's certificate thereto, and, relying upon such certificate, he made the loan. Mrs. Mahoney, on the second trial, testified that Reek brought the mortgage to their residence on the evening of January 10th, and that she saw her husband read it at that time, and that he and Reek were talking about it in her presence.

Upon the second trial the court gave instructions 8, 9, and 10, embodying the law as declared by this court in the excerpt from its opinion above, and, in his argument, counsel might better have confined his attention to the instructions so given; but, so long as the portion of the opinion read does not state or comment on the facts, or disclose what the result of the first trial or the appeal was, we are not prepared to say that the trial court abused its discretion in refusing to prohibit the reading of the excerpt quoted.

While there is some diversity of opinion on the subject, the rule seems to be stated correctly as follows: "Some authorities hold it error to permit counsel to read law to the jury in civil cases, while the great majority hold it not necessarily reversible error, but within the sound discretion of the court, to be reviewed only in cases of abuse. Where the latter doctrine pre-

vails, if the law is correctly laid down in the decision or book used by counsel, it does not constitute ground of exception, although such practice is not to be encouraged. But if the reading from a decision was to bring before the jury the facts of the case decided, or the amount of the verdict, or the comments of the judge on the facts, to influence the jury in deciding upon the facts in the case on trial or in fixing the amount of damages, it is generally pronounced to be clearly erroneous." (2 Ency. of Pl. & Pr. pp. 709, 710.) If any distinction whatever is to be made, it would seem that a stricter rule would be observed in criminal than in civil cases. But in *Territory v. Hart*, 7 Mont. 42, 14 Pac. 768, this court said: "Perhaps the correct rule is laid down by English, C. J., in an Arkansas case, as follows: 'The court may, in its discretion, permit counsel to read law to the jury in a criminal case, but it is its province to determine whether the law proposed to be read is applicable to the facts of the case. The matter of reading law to the jury, as part of the argument, is under the discretion and control of the court, and its rulings in the matter are not subject to review, unless its discretion is abused to the prejudice of the accused.' (*Curtis v. State*, 36 Ark. 292.)"

It is apparent that the purpose of counsel was to illustrate his argument and to account for what he contended was the direct contradiction in the testimony of the plaintiff and Mrs. Mahoney, as given upon the first and the second trials, by showing that, according to the law of the case as declared by this court, and by the trial court in instructions 8, 9, and 10, the plaintiff could not possibly prevail if his former testimony, as defendants claimed it was given, was true, and therefore it became necessary for him to change his story in order to prove one of the material allegations of his complaint, viz.: "That he relied upon the statements contained in the certificate of said notary public." Counsel appears to have kept within the rule recognized by the authorities. (*Gilbertson v. Miller M. & S. Co.*, 4 Utah, 46, 5 Pac. 699.)

4. Insufficiency of evidence. The theory of counsel for appellant seems to be that, as the only testimony as to the transaction between plaintiff and Reek was that given by plaintiff, to the effect that the plaintiff saw the executed mortgage with the notary's certificate attached before he parted with his money, and that he made the loan relying on the notary's certificate, and the corroboration of this, so far as it is corroborated by the testimony of Mrs. Mahoney, therefore the verdict in favor of the defendants is not supported by the evidence. But the credibility of the plaintiff and Mrs. Mahoney was a question for the jury; and, if the jury believed that upon the first trial each of these witnesses had sworn to material facts contradictory of their respective stories told upon the second trial, then the jury were at liberty to disregard their testimony given upon the second trial, for there were not any corroborating facts or circumstances; and if their testimony given at the second trial be disregarded by the jury,—as it evidently was,—there was an entire failure of proof, and the verdict for the defendants follows as a matter of course.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

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141	398

HELENA GOLD AND IRON COMPANY, APPELLANT, v.
BAGGALEY, RESPONDENT.

(No. 2,297.)

(Submitted October 10, 1906. Decided November 5, 1906.)

*Mines—Location—Declaratory Statements—Adverse Suits—
Public Lands.*

Mines—Location—Adverse Suits—Declaratory Statement—Sufficiency.

1. The declaratory statements of two lode locations which read, relative to the description of the excavations made at the points of discovery, respectively, that "a shaft the dimensions of which are

— feet and — feet in ten feet and six inches depth" had been sunk, and in the other, that "a tunnel, the dimensions of which are — by — feet, and eleven feet eight inches in length." had been run, were defective in that they each contained a statement of but one dimension, whereas the statute (Political Code, section 3612, as amended by Session Laws, 1901, page 140) requires "the dimensions," including length, breadth and depth, to be stated.

Same—Declaratory Statements—Statutory Requirements.

2. The declaratory statement of a lode location should so far comply with the requirements of the statute (Political Code, sections 3611, 3612, as amended by Session Laws, 1901, page 140) as to leave an inference, at least, that the excavation made at the point of discovery cuts the vein at a depth, in case of a shaft, and at a length, in case of a tunnel, of ten feet below the surface.

Same—Adverse Suits—Judgment.

3. *Obiter*: Inasmuch as the federal government is a *quasi* part to adverse suits to mining claims, where it appears that neither party is entitled to patent, judgment should be rendered to that effect.

Same—Location—Interest of Locator.

4. The interest which a locator of a mining claim has in the same, prior to procurement of patent, is only a right to the exclusive possession of the land based upon conditions subsequent, by a failure to fulfill which he forfeits his interest in the claim.

Same—Conflicting Locations—Public Lands.

5. *Held*, that where the locator of a lode mining claim failed to comply with the requirements of the statute relative to completing his location after the posting of his declaratory statement, and another made a location conflicting with the claim of the prior discoverer, the area in conflict did not revert to the public domain, but inured to the benefit of the junior locator who, by performing the necessary work required by statute, became entitled to the possession of it.

Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge.

ACTION by the Helena Gold and Iron Company against Ralph Baggailey. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Mr. C. B. Nolan, for Appellant.

This court has at all times adopted a liberal rule of construction in the consideration of these location notices, and in *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153, the doctrine was announced that only a substantial compliance with the law was needed. (*Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; *Bramlett v. Flick*, 23 Mont. 96, 57 Pac. 869; *Walker v. Pennington*, 27 Mont. 369, 71 Pac. 156; *Wilson v. Freeman*, 29 Mont. 470, 75 Pac.

84, 68 L. R. A. 633. See also, *Emerson v. McWorther*, 133 Cal. 510, 65 Pac. 1036; *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31; *Duncan v. Fulton*, 15 Colo. App. 140, 61 Pac. 244; *Farmington Gold Min. Co. v. Rhydney Gold etc. Co.*, 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832; *Smith v. Newell*, 86 Fed. 56.)

The effect of the posting of the notice of location of the Wisconsin lode was to secure to the locator the right of possession to a tract of land, whose exterior boundary extended in every direction eleven hundred and fifty feet from the place where the notice was posted. (*Sanders v. Noble*, 22 Mont. 115, 55 Pac. 1037, and cases cited; *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560.) On the 6th of December, 1904, the predecessor in interest of the defendant posted a notice of location to the Success claim which covered this ground in controversy with the Wisconsin claim. The ground at the time when this posted notice was placed thereon was not public domain subject to appropriation. The posted notice of the locator of the Wisconsin lode gave him the right to the possession of the ground for thirty days and the attempt to secure the ground through its location as the Success claim was a trespass, and intitled no right to the ground. (*Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443; *Sullivan v. Sharp*, 33 Colo. 346, 80 Pac. 1054; *Sierra Blanco Min. etc. Co. v. Winchell* (Colo.), 83 Pac. 628; *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673; *Porter v. Tonapah North Star Development Co.*, 133 Fed. 756; *Peoria etc. Min. Co. v. Turner* (Colo. App.), 79 Pac. 915.)

Mr. Wm. T. Pigott, Mr. C. R. Stranahan, and Mr. John J. McHatton, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant on March 13, 1905, filed an application in the land office at Helena for a patent to the Success quartz lode mining claim. Within the sixty days of publication of notice of the application, the plaintiff filed its adverse claim, alleging right to the possession of the ground covered by the Success

claim to the extent of five and eight-hundredths acres under two prior locations, named, respectively, the "Helena" and the "Wisconsin" quartz lode claims. This action was then brought to determine the right of possession to the area in controversy.

The discovery of the Success lode was made by one William M. Kirkpatrick, the grantor of the defendant on December 6, 1904. The preliminary work was done and his declaratory statement was filed and recorded on January 4, 1905. The discovery of the Helena lode was made on April 9, 1904. The declaratory statement was filed for record on June 8, 1904. Title to the Wisconsin lode is based upon a discovery and location made on November 14, 1904, the record of which was made on January 10, 1905.

At the trial the defendant objected to the introduction in evidence of the declaratory statements of the Helena and Wisconsin lode claims, on the ground that they are void, in that they do not state the dimensions of the excavations made at the points of discovery upon the two claims; the excavation in the one case being a shaft and in the other a tunnel. The objections were overruled, and the statements were admitted. Upon the evidence adduced the court made findings of fact and conclusions of law, and rendered judgment for the defendant. The appeal is from the judgment.

No question is made as to the validity of the Success location, except as to the area in conflict. The contention is that the court erred in its conclusions of law upon the facts found, and in rendering judgment for the defendant. The defendant answers this contention by the argument that the judgment is correct because (1) the complaint does not state facts sufficient to constitute a cause of action; and (2) that it is apparent that the declaratory statements filed for record for both the plaintiff's claims, which are set forth in full in the findings, are ineffective to show any right in the plaintiff, since they do not meet the requirements of the statute. The second contention of the defendant must be sustained, and is conclusive of the case. Since this is so, we shall not pause to consider whether the complaint

is sufficient, but, for present purposes, assume that it is, and proceed to discuss the questions presented by the second contention.

In so far as it is necessary to consider the declaratory statements, the portions of them describing the excavations made at the points of discovery are as follows: For the Helena claim the statement is: "Since and within sixty days from the date of this location, the following work has been performed upon said lead, viz.: At the point of discovery a shaft, the dimensions of which are _____ by _____ feet and _____ feet in ten feet and six inches depth." In this connection the Wisconsin statement reads: "Since and within sixty days from the date of this location, the following work has been performed upon said lead, viz.: At the point of discovery, a tunnel, the dimensions of which are _____ by _____ feet, and eleven feet eight inches in length." Assuming, for present purposes, that the locations of these excavations are sufficiently fixed by other recitals in the statements, these are the only recitals descriptive of the preliminary work done on either claim.

Section 3610 of the Political Code provides that on all claims a notice must be posted at the point of discovery stating: 1. The name of the lode; 2. The name of the locator or locators; 3. The date of the location; 4. If a lode claim, the number of lineal feet claimed along the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein, as near as may be.

Section 3611, as amended by the Act of 1901 (Session Laws 1901, p. 140), declares that, before the expiration of sixty days after posting the notice, the locator or locators must sink a discovery shaft upon the claim to the depth of at least ten feet from the lowest part of the rim of the shaft, or deeper, if necessary, to show a well-defined crevice or valuable deposit. A cut, cross-cut, or tunnel which cuts the vein at the depth of ten feet below the surface, or an open cut of at least ten feet in length along the lode from the point where the lead is discovered, is declared to be equivalent to a discovery shaft. Amended section 3612 is

the same as Code section 3612, except that it omits subdivision 7 of the latter, which required the declaratory statement to contain the location and description of each corner with the markings thereon.

Sections 3611 and 3612 were amended to avoid the effect of the decision in *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153. This case declared a notice insufficient which failed to give the location and description of the corners with the markings thereon. No other change was made in section 3612, and its requirement as to the location and dimensions of the discovery shaft or other excavation at the point of discovery, required as preliminary work, are the same as in the Code section. It declares that the notice must contain: "(6) The dimensions and location of the discovery shaft, cut or tunnel, or its equivalent, sunk upon lode or placer claims." The language of the statute is mandatory in terms. Hence, this court in construing it has departed somewhat from the liberal rule of construction held applicable to such statements prior to the adoption of the Code of 1895, and has uniformly held that the requirements therein must be substantially observed. (*Purdum v. Laddin*, *supra*; *Hahn v. James*, 29 Mont. 1, 73 Pac. 965; *Wilson v. Freeman*, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833; *Dolan v. Passmore*, *ante*, p. 277, 85 Pac. 1034.)

As stated above, the defect rendering the notice abortive in *Purdum v. Laddin* was a failure to give the location and description of the corners with the markings thereon. In *Hahn v. James*, there was the same defect, in addition to a failure to give the location and dimensions of the discovery shaft. Again, in *Wilson v. Freeman*, there was a failure to give the location of the discovery shaft, and further, since it appeared that the plaintiff's claim was based upon a relocation of an abandoned claim, the notice was also declared abortive because of a failure to comply with the requirements of section 3615, touching the relocation of such claims. In *Walker v. Pennington*, 27 Mont. 369, 71 Pac. 156, it was held that a notice was not, as a matter of law, defective which omitted from the description of

the corner posts a statement of their length. This holding proceeded upon the correct theory that, since subdivision 7 of section 3612 did not require this to be stated, but the location and description only with the markings, and the notice did contain a statement of these, it was *prima facie* good. In the case of *Dolan v. Passmore* a notice which failed to show, even by inference, that the tunnel at the point of discovery cut the vein ten feet below the surface, as is required by section 3611, *supra*, but did show that the contrary was the fact, was held insufficient.

One purpose of these requirements was that the claim might be identified by the notice, so that one going upon the ground with it might find the claim, and know from the evidences found there that the statute has been complied with. Another purpose was to do away with a practice which had prevailed prior to the enactment of the Code, whereby one person with little labor could make a number of locations in the same locality, and thus withdraw from exploration by other prospectors a large area of the public land. It was deemed unwise that this practice should prevail, and hence the requirement that substantial work should be done before the notice of location could be filed, and that the notice should show that such work had in fact been done; and though the posts or other markings might disappear, the excavations upon the ground would remain, and they should be of such character as to meet the requirements of the statute and thus effectuate its purpose. The legislature amended the Code provision so as to remove the necessity of locating and describing the corners with the markings thereon, but it permitted section 3612 to remain otherwise intact; thus evincing a purpose that the locator of a mining claim should not be released from doing the work required under the Code provision in order to make his location valid.

The notices before us contain a statement of but one dimension of the excavations, whereas the statute requires "the dimensions" to be stated, including, of course, length, breadth and depth. The duty of courts is to find out what the legislature

has said upon the subject in hand, and, if the language is clear and unambiguous, to follow it, and declare the rights of the parties accordingly. A statement of the depth of an excavation is no more a statement of "the dimensions" of it than would be a statement of its breadth. Of course, a shaft must have dimensions, but a hole driven by a diamond drill also has dimensions; and, so far as the dimensions given in either one of the notices in question go, they would apply as well to a drill hole as to a shaft or tunnel.

While the court might have excluded the notices upon the objection of counsel, which was seasonably made, under the cases cited it was clearly correct in its conclusion from the facts found that the judgment must be for the defendant.

It was suggested during the argument that the case of *Dolan v. Passmore* applies too strict a rule, in that under it the notice must state that the preliminary work has been done, as required in section 3611. What is said in that case is that it must appear from the record that the preliminary work has been done. This is manifestly the purpose of section 3612, when read in connection with section 3611. The dimensions are not set forth intelligibly in the notice which was considered in that case; but, even if they were, a tunnel of the dimensions given could not possibly cut the vein at the depth of ten feet below the surface. The requirement of the statute that the notice must state the dimensions could have no other purpose than to show a compliance with the law; and while we do not say that the notice should state definitely that the excavation cuts the vein at the depth or for the length required by the statute, yet the statement of the dimensions must be such as to leave at least an inference that such is the case, and a notice which fails to thus set forth the work done certainly does not conform to the spirit of the statute. If these requirements are too burdensome, an appeal may well be made to the legislature to lighten them; but the courts have no power to say that this or that substantial requirement may be omitted and the notice still be good. If such were the rule, the courts could ignore or nullify the will of the

legislature as expressed in its solemn enactments, and substitute instead their own notions of what the law ought to be.

Counsel for appellant contends further that, even if the Helena and Wisconsin locations are void, the judgment must be held erroneous, for the reason that the Success lode was located during the sixty days allowed under the statute for a completion of the Wisconsin location, after the preliminary notice required by section 3610 had been posted. The argument is that, by posting this notice, *pro hae vice*, and for the period of sixty days, an area of the public domain, equal to a circle whose radius is the longest distance claimed along the lode from the point of discovery, is withdrawn absolutely from the public domain, and that a location made on any part of this area during this period is invalid. In support of this contention, he cites, among other cases, *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037, and *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 565, 28 L. Ed. 1116.

Since the federal government is a *quasi* party to suits of this character, and it is incumbent upon the court, in a proper case, to render judgment that neither plaintiff nor defendant is entitled to a patent (*Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; *Wilson v. Freeman*, *supra*), it becomes necessary to notice this contention; for, although the plaintiff may not present a case upon which he may recover, defendant may not, upon his own showing, be entitled to a patent.

In the case of *Sanders v. Noble*, the facts were that the plaintiffs and defendants claimed title to a conflicting area; the former under a location of the Never Sweat lode, and the latter under a location named the Yukon. The locations were made under the following circumstances: In August, 1897, plaintiffs were prospecting in the vicinity of the conflicting area. On August 7th they made a discovery, and after some preliminary work posted the notice required by section 3610, *supra*. They then left the vicinity to do work elsewhere, and were gone for about thirty days. In their absence, and during the same month, the defendants went upon the ground and located the Yukon, completing their location within thirty days after posting their

notice. The plaintiffs thereafter, and within the ninety days allowed by the statute, did their preliminary work and completed their location. Both made the record required within the ninety days. The two claims being in conflict, the question arose as to who was entitled to the area so in conflict. It was held upon a review of the authorities, following the case of *Erhardt v. Boaro, supra*, that the ninety days allowed by the statute after making a discovery and posting the notice were intended to give the discoverer of a lead time to explore it and find out its strike, so that he would know how to lay his claim, and therefore that he could during the ninety days swing the claim in any direction, so as to extend it along the vein to the exclusion of any other location made in the meantime, within a circular area, the diameter of which is equal to the longest distance claimed from the point of discovery. So in the later case of *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869, the same condition was held to obtain, under section 1477, Fifth Division of the Compiled Statutes of 1887, for the twenty days allowed for the doing of the preliminary work in the completion of the location. But it may not be overlooked that the question before the court in each of the cases was, what the rights of the parties were after both had completed their locations, and both sought to preserve such rights as they had, so far as they might by a compliance with the statute. Read in the light of the facts of this case, they have no application.

The locator of the Wisconsin lode did not comply with the statute, and whatever rights the plaintiff obtained by the preliminary notice posted upon the claim were therefore forfeited and lost. The question here, therefore, is: Did the posting of the notice upon the ground supposed to be covered by the Wisconsin location withdraw it from the public domain, so as to render invalid the location of the Success claim as to the conflicting area, whereas but for this fact it would have been valid? This question, we think, is answered adversely to plaintiff's contention by the case of *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, decided in 1904. A brief statement of

that case is the following: Uhlig and McKernan, defendants in error, applied for a patent under adjacent locations made on January 1, 1899, named the Uhlig No. 1 and the Uhlig No. 2. Lavagnino filed his adverse claim to a portion of each of the Uhlig claims, which it was asserted overlapped the Yes You Do claim, and entered his action to establish it as the alleged owner of the Yes You Do. The ground covered by the Yes You Do had theretofore been located under the name of the Levi P. claim. But it was asserted that the rights under this claim had been forfeited, and that at the time the Yes You Do claim was located the ground had reverted to the public domain, and hence that the Yes You Do claimant was entitled to the possession of the whole area, notwithstanding the Uhlig locations. The court, in construing section 2326 (U. S. Comp. Stats. 1901, p. 1430) of the United States Revised Statutes, said: "This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice, and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section; thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights, and cause them, in effect, to inure to the benefit of the applicant for a patent by failure to adverse, or, after adverseing, by failure to prosecute such adverse."

"It cannot be denied that under section 2326, if before abandonment or forfeiture of the Levi P. claim the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adverseed the application, upon an establishment of a *prima facie* right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice (*Gwillim v. Donnellan*, 115 U. S. 45, 51, 5 Sup. Ct. 1110, 49 L. Ed. 348);

and the same result would have arisen had the owner of the Levi P. adversed the application for a patent based upon the Uhlig locations, and failed to prosecute, and waived such adverse claim.

“In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location, and not subject to be acquired by another person; and this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete.”

If this be a correct view of the law as to the effect of the forfeiture of an older claim which is overlapped by a junior one,—and we deem it conclusive,—for a much stronger reason must the failure of the claimant to complete his location after posting his preliminary notice inure to the benefit of a junior locator whose claim is in conflict with such older claim, when the inchoate right acquired by the discovery and the posting of the notice never became fixed by a completion of the location. At best, “the interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator’s interest in the claim.” (*Black v. Elkhorn Min. Co.*, 163 U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221.) And under the rule of *Uhlig v. Lavagnino*, *supra*, a forfeiture of the location, or the abandonment or forfeiture of the right acquired by the posting of the notice, does not cause the area covered by

it, so far as it is in conflict with a junior right, to revert absolutely to the public domain, but to inure to the benefit of the junior locator.

Recurring again to the cases of *Sanders v. Noble* and *Bramlett v. Flick*, *supra*, it may be remarked that, if they are to be understood as declaring the law to be that the posting of the preliminary notice effects, for the time being, an absolute withdrawal of the whole area in the circle from exploration, they are in conflict with the decision in *Uhlig v. Lavagnino*. But we do not think the rule stated in them goes so far as to exclude other prospectors from the area absolutely, but only precludes the acquisition of rights within the area which would interfere or conflict with the right of the prior discoverer to swing his claim so as to lay it along the lead after his explorations demonstrate its strike. Such other explorer would certainly go in at his peril. But after the first discoverer has completed his work and located his claim, the junior discoverer, it seems, ought to be secure in any location made by him in the meantime upon other portions of the area not in conflict with the rights of the first discoverer. We do not think there is anything in either of the cases in conflict with this idea. If there is, they must be considered modified, so as to conform to the views now stated.

We are of the opinion, therefore, that the failure of the discoverer of the Wisconsin lode to fulfill the conditions subsequent by a completion of the location after the posting of his notice did not cause the area in conflict between the Wisconsin lode and the success lode to revert to the public domain, but that it inured to the benefit of the Success lode claim, and that by the performance of the conditions subsequent by the discoverer of the Success lode the locator of it became entitled to the possession of it.

Since these views are conclusive of the rights involved we shall not discuss the questions of practice argued by counsel.

The judgment of the district court is affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

JOHNSON, RESPONDENT, v. MAIETTE, APPELLANT.

(No. 2,308.)

(Submitted October 11, 1906. Decided November 12, 1906.)

*Master and Servant—Personal Injuries—Evidence—Contributory Negligence—Instructions.***Master and Servant—Personal Injuries—Defective Appliances—Evidence—Review.**

1. Evidence submitted in an action for personal injuries, alleged to have been sustained by plaintiff, a laborer, by reason of his employer's negligence in directing him to work in an unsafe place and with defective appliances, reviewed and held sufficient to go to the jury.

Same—Contributory Negligence—Servant Choosing Mode of Doing Work.

2. Where a laborer was directed by his employer to make certain alterations on an elevator without indicating the mode in which the work should be done, and the employee voluntarily selected one which was more dangerous than another method in which it might have been done, it must have appeared, in order to attribute contributory negligence to the employee as a matter of law, that the mode employed by him was known to him to be more dangerous, or its dangerous character must have been so obvious that he could be presumed to have known it.

Same—Negligence of Employer in Giving General Directions.

3. An order by an employer to his employee to do certain work without pointing out the mode of doing it was equivalent to directing him to use such mode as to him (the employee) seemed most suitable; and where, in performing the work, the servant was injured, it was a question for the jury to say upon the evidence,—which tended to prove the allegations of the complaint that the injury was caused by reason of a defective appliance furnished by defendant employer and that the latter gave such direction,—whether the defendant was guilty of negligence in supplying such faulty appliance and in giving the general direction to the employee he did give.

Same—Instructions—"Obviously" Dangerous Mode of Doing Work.

4. An instruction given in an action against a building contractor for personal injuries to one of his employees, who had been directed to do certain work without being told in what mode to do it, and in doing it was injured, to the effect that where two ways are open to an employee of performing a duty, one of which is *obviously* dangerous and the other safe, and he knowingly and voluntarily or through negligent ignorance selects the dangerous one, thereby bringing upon himself an injury which probably would not have befallen him had he selected the other one, he cannot recover, but contributory negligence will be imputed to him as a matter of law, was not made erroneous by the use of the word "obviously" before the word "dangerous."

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by August Johnson against Joseph Maiette for personal injuries. From a judgment in favor of plaintiff and from an order denying him a new trial, defendant appeals. Affirmed.

Messrs. McBride & McBride, for Appellant.

Where the employer has furnished the facilities for performing the work in a safe manner, and the servant of his own accord selects the way or manner of performing the work which is less safe than that provided by the master, and the servant is injured, the servant cannot recover for the injury, for the reason that he has been guilty of contributory negligence. (5 Thompson on Negligence, par. 5372; *Kilroy v. Foss*, 161 Mass. 138, 36 N. E. 746; *Kinney v. Corbin*, 132 Pa. St. 341, 19 Atl. 141; *Towne v. United Electric etc. Co.*, 146 Cal. 766, 81 Pac. 124, 70 L. R. A. 214; see, also, 5 Thompson on Negligence, sec. 5372; 1 Labatt on Master and Servant, par. 258.)

Messrs. Maury & Hogevoll, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover damages for a personal injury alleged to have been suffered by the plaintiff through the negligence of the defendant. The defendant is a building contractor. At the time of the accident he was engaged in erecting a building in the city of Butte. The plaintiff was employed by him as a mortar carrier. The complaint alleges that it was then and there the duty of the defendant to furnish to plaintiff a reasonably safe place to work; that the defendant directed the plaintiff to go upon a certain elevator; that, unknown to the plaintiff the elevator was insecurely and negligently stationed at the second floor above the ground floor of the basement of the building; that it was in a dangerous condition through the

negligence of the defendant in placing, or allowing to be placed, under it to support it a plank which was weak, insufficient, unsafe and dangerous; and that, without negligence on the part of the plaintiff, and while he was engaged in exercising due care, the plank broke while he was on the elevator at the command of the defendant with the result that he fell a distance of twenty feet, breaking his arm at or near the wrist, resulting in permanent injury. Judgment is demanded for \$2,575, including expenses for medical treatment.

The answer admits the employment and the injury, but denies all the other material allegations of the complaint. It alleges affirmatively that the injury was the result of plaintiff's own negligence, in this: That the elevator had been used to raise brick and mortar from the ground to the second floor of the building; that it had two cages, connected by cable, and was so operated that when one cage was at the ground floor the other was at the second floor; that during the progress of the work it became necessary to change it so that it could be used to raise material to the third floor also, and in order to effect the change it was necessary to detach the cage at the second floor from the cable which connected it with the cage on the ground floor; that to hold the cage at the second floor while making the change it was allowed to rest upon a plank which was placed under it, with its ends resting on the floor on either side of the elevator shaft; that the plank was intended to support the cage and nothing else; and that, while the cage was so supported, the plaintiff, without directions from the defendant, but carelessly, negligently, and wrongfully, went upon it and busied himself in such a way thereon that the plank broke, allowing the cage to fall to the ground, carrying plaintiff with it. Upon these allegations there was issue by reply. The trial resulted in a verdict for plaintiff for \$500, and judgment was entered accordingly. The defendant has appealed from the judgment and an order denying a new trial.

Many assignments of error are set out in the brief, but the only ones argued and submitted for decision are that the evi-

dence is insufficient to justify the verdict and that the court erred in submitting certain instructions to the jury.

Plaintiff's evidence tended to show that the defendant, desiring to effect the necessary change in the elevator, went with another employee to the second floor and while this employee, assisted by the plaintiff, who remained on the ground floor and pulled upon the cable, raised the cage, the defendant thrust under it and across the shaft a plank, two inches thick and ten or twelve inches in width, leaving the ends resting on the floor on either side of the shaft. Upon this plank the cage rested. The defendant, having then directed the plaintiff and the other employee to make the change, went to another part of the building. A part of the work necessary to effect the change was a removal of the guide rods. These were made of gas-pipe and had to be unscrewed and lifted out. They could be lifted out by a person standing on the floor on the outside of the elevator shaft, but more conveniently by one standing on the deck of the cage. The plaintiff deemed it more convenient to stand on the deck of the cage, and did so, for the reason that he could not have the same purchase for the lift while standing on the floor, and for the further reason that one board was missing from the floor at the side of the shaft where he would have to stand, and for this reason the footing was not safe. The evidence does not show of what kind of wood the plank was, but it had a knothole in it, and, besides, was decayed. The plaintiff knew that the cage rested upon the plank, but knew nothing of its character or of any defect therein. He testified that, if it had been sound and without flaw, it would easily have sustained his weight as he lifted, in addition to that of the cage. The weight of the plaintiff was one hundred and sixty pounds. As the plaintiff lifted upon the rod, the plank broke and the cage fell, breaking plaintiff's arm. Immediately after the accident the defendant admitted that he was solely to blame. The plaintiff had worked as a miner and had had some experience in using planks of the dimensions of the one here employed, to support heavy machinery.

Defendant's testimony was to the effect that the cage was composed of hard wood and iron, and weighed about three hundred pounds. A pipe ran around the middle of it and under the deck, so that, when it rested on the plank, the pipe fell upon its middle, causing the whole weight of the cage to rest on that point. Some of his witnesses testified that there was no hole in the floor; that it was quite as convenient for the plaintiff to stand upon it, even if he had been compelled to stand astride of the hole; that it was safer than to go upon the deck of the cage; and, in any event, that the proper way for the plaintiff to have reached the guide rods was by standing on a board running across the shaft outside of the cage or by standing on a scaffold made by placing a plank upon two bars on the frame of the elevator about twenty inches above the floor. The defendant denied that he had admitted at any time that he was to blame for the accident, but stated that, while he did direct the plaintiff to make the change in the elevator he gave no directions as to how the work should be done. It is somewhat difficult to understand from the transcript of the evidence exactly what the situation was; but the foregoing seems to be a fair statement of it.

Counsel for appellant contends that this evidence did not make a case for the jury because it conclusively appeared therefrom that the plaintiff was not directed to go upon the cage, and that of the different ways by which the work could have been done, he chose the one which was obviously the most dangerous, and hence was guilty of contributory negligence as a matter of law. It seems to us, however, that in directing the plaintiff to make the change, without pointing out the mode which should be pursued, the defendant necessarily directed him to employ such mode as to him seemed most suitable, and necessarily that he should go upon the cage and use that as his means of support, if that should appear as convenient and as safe as any other mode. Taking the order in connection with the fact which the evidence tends to show, and which for present purposes we must assume to be established, that, if the plank had been sound

and flawless, the deck of the cage would have furnished as safe footing as the floor or scaffold referred to by the defendant, the evidence fairly supports the allegation of the complaint on this point; and it was a question for the jury to say, upon the evidence, whether the defendant was guilty of negligence in the use of the plank for a support and in giving the general directions to the plaintiff that he did.

Mr. Thompson, in his work on Negligence, section 5372, says: "Generally speaking, where an employee has a duty to perform, and there are two ways or methods of performing it, or of reaching the place of performing it, one of which is dangerous and the other safe, or one of which is more dangerous than the other and the employee knowingly and voluntarily, or through negligent ignorance, and without there being any emergency, selects the dangerous one or the more dangerous one, in consequence of which selection he brings upon himself an injury which probably would not have befallen him if he had selected the other one, he cannot make his own negligence in making the choice the ground of recovering damages against his employer, but contributory negligence will be imputed to him as matter of law."

It will be noticed that under the rule stated by this author negligence will be imputed to the plaintiff only when it is apparent that he acts with knowledge that the method chosen is the more dangerous, or the circumstances are such that he ought to know that it is the more dangerous. We hold the converse of the rule to be true. When the servant is directed to perform certain work without directions as to the mode or means to be employed by him, and he voluntarily selects the mode or means which is dangerous or more dangerous, rather than the one which is safe or less dangerous, but does so without knowledge of its dangerous character, and the circumstances are not such as to warrant the presumption that he ought to know, negligence will not be imputed to him as a matter of law, but it will be left to the jury to determine whether or not, under all the circumstances, he ought to have known of the danger. In other words, in order

that contributory negligence may be attributed to him as a matter of law, it must appear that the mode employed by him is known to him to be more dangerous, or its dangerous character must be so obvious that he may be presumed to have known it; for it seems clear that if the means of doing the work have been supplied by the master, and one of them is dangerous, the choice being left to the servant, negligence should not be imputed to him as a matter of law unless he has knowledge, actual or constructive, that one of the means is dangerous and the other safe. (1 Labatt on Master and Servant, sec. 333, and illustrative cases in note.)

We are of the opinion, then, that the contention of the defendant cannot be sustained, and that the court correctly overruled his motion for a new trial on the ground that the evidence was not sufficient to go to the jury.

The first criticism made upon the instructions is directed to paragraph 4 of the charge, in which the court laid down the rule as to where the burden of proof rests to establish negligence on the part of the defendant and contributory negligence on the part of the plaintiff. We think the rule is correctly stated and that the defendant has no ground of complaint.

Instruction No. 8 requested by defendant, after quoting the above paragraph from Thompson on Negligence, had added to it a sentence which was deemed necessary to make it applicable to the circumstances of this case. The court modified it by inserting the word "obviously" before the word "dangerous" in the first part of the paragraph. It is said that this modification of the text was prejudicial. We do not see, however, that it materially alters the meaning of the language used by the author, because the word "obviously" only emphasizes the notion that, in order for contributory negligence to be imputed to the plaintiff as a matter of law the danger of the means or method must have been known to him, or the circumstances must have been such that it ought to have been known to him. The sentence

added by counsel was also modified to express the same idea more clearly.

We find no error in the record and the judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

Rehearing denied December 8, 1906.

FOURNIER, RESPONDENT, v. COUDERT, APPELLANT.

(No. 2,309.)

(Submitted October 8, 1906. Decided November 12, 1906.)

Appeal—New Trial—Review—District Courts—Discretion.

Appeal—New Trial—When Order Granting It will be Affirmed.

1. Where a motion for a new trial was made upon the grounds of newly discovered evidence, insufficiency of the evidence to justify the finding, and that the finding was against law, and the order sustaining it did not designate on which of the grounds it was made, the order will be affirmed if justified on any one of the grounds mentioned in the motion.

Same—Review—New Trial—Conflicting Evidence—District Courts—Discretion.

2. In the district court is lodged the sound legal discretion to grant or refuse a new trial in a case where the evidence is conflicting, and its action in the premises will not be reviewed on appeal except for a manifest abuse of such discretion.

Same—Review—New Trial—Finding Against Evidence—District Courts—Discretion.

3. If in the opinion of the trial court the evidence in a given case preponderates against the finding of the jury, it should be set aside, and where its action in granting a motion for a new trial can be justified upon that theory, the supreme court on appeal will not say that it abused its discretion in granting the motion.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

34	484
35	69
136	100
136	415
34	484
37	189
37	484
34	484
39	343

ACTION by Josephine Fournier against Marguerite Coudert. From an order granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Messrs. McIntire & Kendall, for Appellant.

Mr. D. F. Smith, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced by Josephine Fournier to enforce a vendor's lien upon certain real estate situated in Kalispell. In the first paragraph of the complaint the plaintiff alleges that she sold to the defendant the property therein described, for which the defendant agreed to pay her the sum of \$750. The complaint further alleges that defendant has failed to pay any part of the purchase price, except the sum of \$45. The plaintiff claims a vendor's lien upon the property for \$705, the balance of the purchase price. The answer admits the allegations of paragraph 1, but denies every other allegation in the complaint. The cause was tried to the court sitting with a jury. The jury returned a special finding to the effect that nothing remained unpaid on the purchase price of the property. The plaintiff moved for a new trial upon the following grounds: (1) Newly discovered evidence; (2) insufficiency of the evidence to justify the finding; and (3) the finding is against law. After a hearing this motion was sustained in an order general in its terms. From that order the defendant appeals.

Counsel for appellant in their brief proceed upon the theory that the court granted the motion for a new trial upon the ground of newly discovered evidence, and argue that there was not a sufficient showing of diligence on the part of the plaintiff to warrant the court in considering that ground of the motion. With this argument of counsel and their conclusion we agree. But there is not anything in the record to justify their conclusion that the decision of the trial court was based upon

added by counsel was also modified to express the same idea more clearly.

We find no error in the record and the judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

Rehearing denied December 8, 1906.

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Same—Review—New Trial—Conflicting Evidence—District Courts—Discretion.

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Same—Review—New Trial—Finding Against Evidence—District Courts—Discretion.

3. If in the opinion of the trial court the evidence in a given case preponderates against the finding of the jury, it should be set aside, and where its action in granting a motion for a new trial can be justified upon that theory, the supreme court on appeal will not say that it abused its discretion in granting the motion.

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Mr. D. F. Smith, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

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Counsel for appellant in their brief proceed upon the theory that the court granted the motion for a new trial upon the ground of newly discovered evidence, and argue that there was not a sufficient showing of diligence on the part of the plaintiff to warrant the court in considering that ground of the motion. With this argument of counsel and their conclusion we agree. But there is not anything in the record to justify their conclusion that the decision of the trial court was based upon

the ground of newly discovered evidence. The only issue tried was whether the purchase price had been paid. Upon that issue there was a direct conflict in the testimony. The motion was made upon at least three distinct grounds. The order sustaining does not designate on which of the grounds it was made. The order will be affirmed, then, if justified upon any one of the grounds of the motion. (*Case v. Kramer*, ante, p. 142, 85 Pac. 878; *Gillies v. Clarke Fork Coal M. Co.*, 32 Mont. 320, 80 Pac. 370; *Wright v. Mathews*, 28 Mont. 442, 72 Pac. 820; *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106.)

It is a well-settled rule in this state that, where the evidence is conflicting, the granting or refusal of a motion for a new trial is lodged in the sound legal discretion of the trial court. (*Case v. Kramer*, above; *State v. Landry*, 29 Mont. 218, 74 Pac. 418; *O'Rourke v. Sherman*, 23 Mont. 310, 58 Pac. 810.)

In *Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146, this court said: "Whether or not a new trial should be granted for the reason that the verdict is against the weight of the evidence is a question peculiarly within the sound legal discretion of the trial judge, who has the advantage of seeing the witnesses, of hearing their testimony orally delivered, and of observing their demeanor and conduct upon the stand; hence the exercise of such discretion will not be disturbed by this court." And it is only in case of a manifest abuse of the discretion that this court can interfere. (*Case v. Kramer*, above; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057; *Haggin v. Saile*, 14 Mont. 79, 35 Pac. 514.)

If the judge of the trial court is satisfied that the finding of the jury is not warranted by the evidence—that is, that the evidence preponderates against the finding—such finding should be set aside. (*Harrington v. Butte & Boston M. Co.*, 27 Mont. 1, 69 Pac. 102; *Patten v. Hyde*, 23 Mont. 23, 57 Pac. 407, and cases cited.)

The action of the trial court in granting the motion for a new trial can be justified upon the theory that the court concluded that the evidence preponderated against the finding; and, as the judge of that court had a much better opportunity to weigh the

evidence, from personal observation of the witnesses while testifying, than is afforded to the members of this court, we cannot say that the trial court abused its discretion in granting the motion. The order is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE MILBURN, having been absent, takes no part in the foregoing decision.

BUTTE ELECTRIC RAILWAY CO., APPELLANT, v. MATHEWS ET AL., RESPONDENTS.

34	487
440	255

(No. 2,312.)

(Submitted November 8, 1906. Decided November 12, 1906.)

Condemnation Proceedings — Evidence — Exclusion—Harmless Error—Judgment—Interest—Instructions.

Condemnation Proceedings—Evidence—Exclusion—Harmless Error.

1. Where, in a proceeding to condemn a right of way across a mining claim for street railway purposes, the plaintiff company had offered in evidence a written offer made to defendants to construct at its own expense a tramway for their use in working their claim and to do other things to minimize the damage resulting from the taking of the way, which offer was excluded, but subsequently the manager of plaintiff testified without objection to the same offer in substance, the error in excluding the prior offer, if error, was cured and not prejudicial.

Same—Damages—Interest—Instructions—Judgment Must Conform to Verdict.

2. In a proceeding for the condemnation of a right of way across a mining claim for street railway purposes, the court instructed the jury that the compensation and damages to be assessed should be deemed to have accrued at the date of the summons, etc., and also that interest should be allowed upon the amount found by them from the day plaintiff took possession of the premises. The jury found the "total amount" to be awarded to defendants to be twelve hundred dollars. The court in entering judgment added interest on that amount. *Held*, under section 1102 of the Code of Civil Procedure, that in entering judgment it was the duty of the court to follow the verdict, and that the allowance of interest by it was error, the verdict indicating that the jury had followed the instruction and made all allowances, including interest, to which they thought defendants entitled.

Action for Recovery of Money—Interest—Judgment—District Courts.

3. *Obiter*: If the jury in an action for the recovery of money should find, under section 1102 of the Code of Civil Procedure, the amount to which defendant is entitled, and specify in the verdict that the amount so found should draw interest from a certain date, the court may compute such interest and include it in the judgment upon the principle that that which can be made certain must be regarded as certain.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

PROCEEDINGS for the condemnation of property by the Butte Electric Railway Company against H. K. Mathews and others. From a judgment in favor of defendants, and an order denying it a new trial, plaintiff appeals. Modified and affirmed.

Mr. W. M. Bickford, and Mr. George F. Shelton, for Appellant.

The allowance of interest by the court was erroneous. If the jury disobeyed the instruction of the court as given, it was the duty of the court, upon proper application for a new trial, to have set aside the verdict as against law. So long, however, as the verdict was permitted to stand, no judgment could be entered for an amount in excess of the verdict. (*Hallum v. Dickinson*, 47 Ark. 120, 14 S. W. 478; *Hallberg v. Brosseau*, 64 Ill. App. 520; *Carter v. Christie*, 1 Kan. App. 604, 42 Pac. 256; *Southern Kan. Ry. Co. v. Showalter*, 57 Kan. 686, 47 Pac. 831; *Parker v. Lake Shore etc. R. Co.*, 93 Mich. 607, 63 N. W. 834; *Wright v. Seeley*, 96 Mich. 491, 56 N. W. 86; *Houston v. Potts*, 64 N. C. 41; *Akin v. Jefferson*, 65 Tex. 137; *Smith v. Smith*, 10 Tex. Civ. App. 485, 32 S. W. 28; *Freiberg v. Brunswick-Balke-Collender Co.* (Tex. App.), 16 S. W. 784.)

In a proceeding for the condemnation of property, under the eminent domain statute, the party seeking to condemn has a right to minimize the damages by the construction and erection of bridges, trestles, or other structures, by which the loss and injury to the owner of the property may be reduced. (*Hayes v. Ottawa etc. Ry. Co.*, 54 Ill. 373; *Chicago etc. Ry. Co. v. Joliet*

etc. Ry. Co., 105 Ill. 388, 44 Am. Rep. 399; *Lyon v. Hammon etc. Co.*, 167 Ill. 527, 47 N. E. 775; *Kansas City etc. Ry. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *McGregor v. Equitable Gas Co.*, 139 Pa. St. 230, 21 Atl. 13; *Tyler v. Town of Hudson*, 147 Mass. 609, 18 N. E. 582; *Elgin etc. Ry. Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577; *St. Louis etc. Ry. Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; *Oregon Ry. etc. Co. v. Owsley*, 3 Wash. 38, 13 Pac. 186; *Packard v. Bergen Neck Ry. Co.*, 54 N. J. L. 553, 25 Atl. 506; *St. Louis etc. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Mobile etc. Ry. Co. v. Postal Tel. Co.*, 76 Miss. 731, 26 South. 370, 45 L. R. A. 223; *Houston etc. Ry. Co. v. Postal Tel. Cable Co.*, 18 Tex. Civ. App. 502, 45 S. W. 179.)

The court erred in permitting defendant's witnesses to testify as to the value of the ground before they were qualified, and erred in permitting their testimony to stand after they had disqualified themselves from testifying as to the market value of the land. (*Watson v. Colusa-Parrott M. & S. Co.*, 31 Mont. 522, 79 Pac. 14; *Teerpening v. Corn Exchange Ins. Co.*, 43 N. Y. 279; *Connecticut Mutual L. Ins. Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; *Morehouse v. Mathews*, 2 N. Y. 514; *Conner v. Stanley*, 67 Cal. 316, 7 Pac. 723; *Rauch v. New York etc. Ry. Co.*, 17 N. Y. St. Rep. 401, 2 N. Y. Supp. 108; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Page v. Hazard*, 5 Hill, 603; *Allen v. Stout*, 51 N. Y. 668; *Wichita etc. Ry. Co. v. Kuhn*, 38 Kan. 675, 17 Pac. 322.)

Mr. C. M. Parr, for Respondents.

Interest upon the assessed value of damages by a jury where the date of entry and possession is fixed and admitted is a question of law for the court, and need not be submitted to the jury; for no disputed questions of fact are involved. (*Lough v. Minneapolis etc. Ry. Co.*, 116 Iowa, 31, 89 N. W. 77.) Interest must be computed from time of entry and possession. (*Seldon v. James*, 6 Rand. 465; *Delaware etc. Ry. Co. v. Burson*, 61 Pa.

St. 369; *Philadelphia etc. R. R. Co. v. Gesner*, 20 Pa. St. 240; *Phillips v. South Park Commrs.*, 119 Ill. 626, 10 N. E. 237; *City of Chicago v. Palmer*, 93 Ill. 125; *Illinois etc. R. R. Co. v. McClintock*, 68 Ill. 296; *City of Chicago v. Barbian*, 80 Ill. 482; *Lough v. Minneapolis etc. Ry. Co.*, 116 Iowa, 31, 89 N. W. 77; *Pegler v. Inhabitants of Hyde Park*, 176 Mass. 101, 57 N. E. 327; *Bellingham Bay etc. Ry. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140. See, also, *Hayes v. Chicago etc. Ry. Co.*, 64 Iowa, 753, 19 N. W. 245; *Hollingsworth v. Des Moines etc. Ry. Co.*, 63 Iowa, 443, 19 N. W. 324; *Hartshorn v. Burlington etc. Ry. Co.*, 52 Iowa, 613, 3 N. W. 648.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff corporation, which owns and operates a street railway in the city of Butte, to condemn a strip of land across the Eveline quartz lode mining claim for right of way purposes. The strip is 60 feet in width by 301.7 feet in length on one side, and 298.3 on the other. The action was commenced and summons issued on June 6, 1901. Prior to that date and on October 15, 1900, the plaintiff, by consent of the owners of an undivided two-thirds interest in the claim, had entered into possession of the right of way strip, and having constructed its road, was in possession at the time the action was brought. All the parties defendant appeared in the case, but the appellants only, representing the remaining undivided one-third interest, filed answers, and, there being no issue of fact presented, the court appointed three commissioners to assess the amount of damages. When their report was filed, the answering defendants appealed from the award. A trial in the district court resulted in the following verdict: "We, the jury in the above-entitled cause, find as follows: That the interest of the answering defendants in the property sought to be appropriated is of the value of \$800 dollars; that the damages suffered by the answering defendants in the portion not

sought to be condemned, by reason of its severance from the portion sought to be condemned, is \$400 dollars; that the interest of the answering defendants will be benefited by the construction of the improvements of the plaintiff in the sum of _____ dollars. The total amount awarded to the answering defendants being \$1,200." Thereupon judgment was entered for the sum so found, with interest from October 15, 1900, the date at which the plaintiff entered into possession. Plaintiff has appealed from the judgment and an order denying it a new trial.

The contentions made in this court are that the evidence is insufficient to justify the verdict, and that the court erred in excluding certain evidence, and in allowing interest on the amount of the verdict from October 15, 1900.

1. It is said that there is no evidence in the record to sustain a finding that the value of the portion of the claim taken exceeded \$1,000, or that the damage to the portion not taken exceeded \$480, and hence that the damages recoverable by the defendants should not in any event have been fixed at any greater amount than one-third of the sum of these two amounts, to-wit, \$493.33. We shall not enter upon a review or analysis of the evidence. We have examined it, and while it is not entirely satisfactory, we think there is sufficient competent evidence in the record to sustain the finding of the jury, and that we should not disturb it.

2. The contention is made that the court erred in excluding from the evidence a written offer made by plaintiff at the hearing before the commissioners to construct across the right of way taken, at its own expense, a tramway for the use of the defendants in removing and dumping debris from their workings upon the property, so as to minimize the damage resulting from the taking. Assuming, without deciding, that this evidence was competent and relevant, the ruling of the court was without prejudice, for the reason that subsequently during the trial the manager of the plaintiff testified, without objection, to the same offer, in substance, namely, that the company would construct the tramway at its own expense. He further testified that the

company would also build cribbing along the right of way, so as to render the injury to the dumping ground as little as possible. This testimony supplied, in substance, the evidence excluded by the ruling of the court, and it was doubtless considered by the jury in fixing the amount of damages. For this reason we think there was no error in the ruling.

3. The court instructed the jury that, for the purpose of assessing the compensation and damages, the right thereto should be deemed to have accrued at the date of the summons, and that the actual value at that date should be the measure of compensation for all the property taken, as well as for that not taken, but injuriously affected by the taking. The jury were also directed to allow interest upon the amounts so found from October 15, 1900, the date the plaintiff took possession. The first sentence of the instruction is taken, in substance, from section 2222 of the Code of Civil Procedure. That section further provides that, in case an order is made letting the plaintiff into possession, as provided in section 2229, the compensation and damages awarded shall draw lawful interest from the date of the order.

Section 2229 provides: "At any time after the report and assessment of damages of the commissioners has been made and filed in the court and either before or after appeal from such assessment or from any other order or judgment in the proceedings, the court or any judge thereof at chambers, upon application of the plaintiff, shall have power to make an order that upon payment into court for the defendant entitled thereto of the amount of damages assessed, either by the commissioners or by the jury, as the case may be, the plaintiff be authorized, if already in possession of the property of such defendant sought to be appropriated, to continue in such possession; or, if not in possession, that the plaintiff be authorized to take possession of such property and use and possess the same during the pendency and until the final conclusion of the proceedings and litigation. * * * " Whether such order as is contemplated by this section was made does not appear. The theory of the instruction,

however, is that, since the plaintiff took possession on October 15, 1900, the defendants should be allowed interest from that date, under section 2222. The correctness of this theory is not questioned, but the contention is made that the court had no power to direct judgment for any other sum than that mentioned in the verdict and we think this contention must be sustained.

Section 1102 of the Code of Civil Procedure provides: "When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery." This is a clear direction that the jury must find the amount of the verdict, and evidently the jury in this case did, for the concluding language of the verdict is: "The total amount awarded to the answering defendants being \$1,200"; thus indicating that the jury followed the instructions given by the court, and made all allowances to which defendants were entitled. Furthermore, "there is no principle of law more firmly established than that the judgment must follow and conform to the verdict or findings." (11 Ency. of Pl. & Pr. 905. See, also, *Frohner v. Rodgers*, 2 Mont. 179; *Kimpton v. Jubilee Placer Min. Co.*, 16 Mont. 379, 41 Pac. 137.)

If the jury had found the amounts to which the defendants are entitled, and had specified that these amounts should draw interest from October 15, 1900, upon the principle that that which can be made certain must be regarded as certain, the court might very well have computed the interest, and included it in the judgment; but such was not the case, and the only thing left for the court to do was to render judgment for the amount found by the jury, leaving it to the defendants, if they were not satisfied, to move for a new trial on the ground that the verdict did not follow the instructions of the court. But since the jury evidently intended that its findings should include all the allowances to which defendants were entitled, we do not think that even this contention would have been meritorious.

The other errors assigned in the record were not argued nor pressed for decision, and we do not think them meritorious. The order denying a new trial is affirmed.

It is ordered that the cause be remanded to the district court, with directions that the judgment be modified by striking out the interest allowed by the court, and, when so modified, that it be affirmed.

Modified and affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing decision.

WILLARD, APPELLANT, v. SMITH, RESPONDENT.

(No. 2,321.)

(Submitted November 10, 1906. Decided November 26, 1906.)

Contracts—Breach—Real Property—Measure of Damages—Pleadings—Complaint.

1. The measure of damages recoverable in an action for the breach of a contract to convey real property is, under section 4306 of the Civil Code, in the absence of bad faith on the part of the vendor, the price paid for the property, together with the expenses properly incurred in examining the title and preparing the necessary papers, with interest. Plaintiff in such an action sued to recover the amount paid by him to secure title, after discovering that defendant was unable to convey it. *Held*, that bad faith not having been alleged, recovery could only be had for the amount paid to defendant on the purchase price, together with incidental expenses, and that the court properly sustained defendant's objection to the introduction of any evidence by plaintiff for the reason that the complaint failed to state a cause of action.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by David Willard against E. G. Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Kirk & Clinton, and Mr. C. A. Wallace, for Appellant, citing on the measure of damages recoverable by plaintiff: Cade v. Brown, 1 Wash. 401, 25 Pac. 457; Neppach v. Oregon & California R. R. Co. (Or.), 80 Pac. 482; Century Digest, sec. 1047.

Messrs. Parr & Langford, for Respondent, citing Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; Johnson v. McMullin, 3 Wyo. 237, 21 Pac. 701, 4 L. R. A. 670; Sawyer v. Warner, 36 Iowa, 333; Cockroft v. New York etc. Ry. Co., 69 N. Y. 201; Sweem v. Steele, 5 Iowa, 352; Foley v. McKeegan, 4 Iowa, 1, 66 Am. Dec. 107; Thompson v. Guthrie, 9 Leigh, 101, 33 Am. Dec. 225; Conger v. Weaver, 20 N. Y. 144; Drake v. Baker, 34 N. J. L. 358; Peters v. McKeon, 4 Denio, 546; Hall v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57; McNair v. Compton, 35 Pa. St. 23; Leggat v. New York Mutual Life Ins. Co., 53 N. Y. 394; Herndon v. Harrison, 34 Miss. 486, 69 Am. Dec. 399.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover damages for a breach of a contract entered into between plaintiff and defendant, under the terms of which the latter agreed to convey to the former lot 20, block 4, in the Boulevard addition to the city of Butte. At the trial the defendant objected to the introduction of any evidence by plaintiff, for the reason that the complaint does not state a cause of action. The objection was sustained, and judgment entered for the defendant for costs. The appeal is from the judgment. The question submitted for decision is whether the ruling of the district court was correct.

The complaint, omitting formal parts, alleges: "That on or about the 2d day of October, 1901, plaintiff entered into an agreement, in writing, with the defendant for the purchase of lot 20, in block four (4) of the Boulevard addition of Butte, Mont., for the consideration of one hundred fifty dollars (\$150);

a copy of which agreement is attached to and made a part of this complaint and marked 'Exhibit A.'

"That the plaintiff paid the defendant said sum of one hundred and fifty dollars (\$150), as provided for in said agreement, and fully complied with every part of said agreement to be by him kept and performed.

"That thereafter, and relying on the conditions of said agreement, plaintiff entered into possession of said described premises and made improvements thereon of the value of twelve hundred dollars (\$1,200.00). That after making said improvements, plaintiff learned for the first time that the defendant was unable to convey a good title to the said described property and was not the owner thereof, and that one George W. Berry. did own the said property.

"That by reason of said agreement with the defendant and the making of the improvements by the said plaintiff, in reliance upon the terms and conditions of said agreement, plaintiff was compelled to and did purchase from said George W. Berry, the real owner of the said premises, the title thereto for the consideration of five hundred dollars (\$500.00). That said purchase was necessary on the part of the plaintiff to protect himself for the improvements made on said premises.

"That plaintiff demanded of the defendant a fulfillment by him of his agreement to sell and convey said property to the plaintiff, and that the said defendant wholly failed and neglected to so fulfill said agreement, and that by reason of the breach thereof plaintiff has sustained damage in the sum of five hundred dollars (\$500.00); being the sum which plaintiff was compelled to pay to get title to the said property, in addition to the amount paid to the defendant.

"Wherefore, plaintiff prays judgment against the said defendant for the sum of five hundred dollars (\$500.00) and costs of this action."

The portion of the contract pertinent here is the following:
"This agreement made and entered into this 2d day of October, 1901, between E. G. Smith, party of the first part, and David

Willard, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the promises and agreements of the party of the second part, hereinafter contained, does hereby agree to sell and convey unto the said party of the second part, lot 20, block 4, Boulevard addition to Butte, Mont., according to the official plat and survey thereof now on file in the office of the county clerk and recorder of Silver Bow county, Mont., upon the following terms and conditions, to-wit," etc. Following are the promises and agreements of the plaintiff, among which is his promise to pay the defendant \$150; \$50 of this to be paid in cash, and the balance in monthly installments of \$25 each, with interest. The writing does not expressly fix the time for the making of the conveyance, but the clear implication is that this was to follow immediately the payment of the last installment of the purchase price as promised by plaintiff. It may be remarked further, that the writing calls for a conveyance of the title. Its requirements could not be met by a conveyance not effective of that purpose.

It will be noticed that the plaintiff has proceeded upon the theory that he is entitled to recover the amount paid by him to secure the title after his discovery that defendant could not convey it to him. In other words he sues for reimbursement in this amount, not for the amount paid defendant. The cause was submitted to the district court on this theory, and counsel argues here that his position is correct. The only question submitted by him is: What is the proper measure of damages?

There is a conflict in the decisions of the courts of the different states upon this question, but the rule in this state has been fixed by statute. Section 4306 of the Civil Code provides: "Section 4306. The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly in-

curred in preparing to enter upon the land." Here no bad faith is alleged; therefore the rule stated in the first part of the section must apply, viz., that the amount recoverable, if anything, is the price paid, together with the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon. Upon his own statements the plaintiff has secured the title. He therefore has the land with the improvements and thus has the advantage of any enhancement of value since the contract was made. So that the only detriment he has suffered has been his payments to defendant, together with the incidental expenses, if any.

The action of the district court was correct and its judgment must be affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

PINCUS, RESPONDENT, v. MUNTZER, APPELLANT.

(No. 2,313.)

(Submitted November 9, 1906. Decided November 26, 1906.)

Sales—Personal Property—Delivery—Warranty of Title—Evidence—Statutes of Limitations—Written Obligations.

Sales—Personal Property—Delivery—Evidence—Sufficiency.

1. Evidence, in an action to recover for the breach of a guaranty to deliver certain personal property, which showed that the goods had been sold to one M., who took possession and transferred the bill of sale evidencing the transaction to one P., with the indorsement that he would "guarantee delivery of same"; that P. resold the property, and that thereafter he found a claim outstanding against certain of the goods and told his grantee to keep the property, that he would satisfy the claim and did so,—in the absence of anything to show that P. prior to reselling had taken possession, or if he attempted to do so, had been prevented from doing it,—was insufficient to show a breach of the guaranty to deliver the property sold, since the only reasonable inference that could be drawn from it was that P. (plaintiff) or his grantee had actually secured possession.

Same—Bill of Sale—Guaranteeing Delivery—Warranty.

2. An indorsement on a bill of sale by the buyer of personal property on a resale thereof that he would "guarantee delivery o. same," does not constitute a warranty of title.

Statutes of Limitations—Written Obligations.

3. The instrument in writing mentioned in section 512 of the Code of Civil Procedure as the foundation of a contract for the breach of which an action must be brought within eight years, is one which in itself contains a contract to do the particular thing for the non-performance of which the action is brought, and not one which by implication may be said to be in writing.

Sales—Personal Property—Warranty of Title—Statutes of Limitations.

4. Where the transfer of personal property was evidenced by a bill of sale, to which the purchaser, upon reselling the goods, added an indorsement guaranteeing delivery, but not expressly warranting title, the language of section 2372 of the Civil Code, which provides that the seller of goods impliedly warrants a good title, may not be read into the indorsement and thereby a written warranty created, so as to make the statutory limitation of eight years, mentioned in section 512 of the Code of Civil Procedure, in which an action on a contract founded upon a written instrument must be brought, applicable to a suit for a breach of a warranty of title to the property sold.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by A. Pincus against Henry Muntzer. From a judgment for plaintiff and an order denying his motion for a new trial, defendant appeals. Reversed and remanded.

Messrs. Kirk & Clinton, and Mr. Chas. A. Wallace, for Appellant.

Mr. J. L. Wines, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In January, 1898, Morris Maloney and May Hannan sold to Henry Muntzer certain personal property and evidenced the transaction by a bill of sale in which there is an itemized list of the property sold. Among the items two pianos are mentioned. Muntzer took immediate possession of the property and on the same day made this indorsement on the bill of sale and then delivered it to A. Pincus, viz.:

"Butte, Jany. 3, 1898.

"I hereby transfer the within bill of sale to A. Pincus and guarantee delivery of same.

"HENRY MUNTZER."

Soon after Pincus had taken the bill of sale with this indorsement on it, he discovered that Mr. Fred. Orton had owned the pianos mentioned and had sold them to Maloney and Hannan upon a conditional sale, the installment plan or such other arrangement, that in fact Orton had an outstanding claim against the pianos for something like \$85. This claim Orton reduced to judgment on October 11, 1899, and this judgment Pincus was obliged to satisfy in order to retain the pianos. After satisfying the Orton judgment, Pincus brought this action on July 5, 1904, against Muntzer for damages by reason of the failure of Muntzer to deliver to Pincus the two pianos, and by reason of the failure of title in Muntzer. The complaint alleges that the sale of the property from Muntzer to Pincus was evidenced by an instrument in writing. The answer denies every allegation of the complaint and pleads the bar of the statute of limitations. The trial in the district court resulted in a verdict and judgment in favor of the plaintiff, and from this judgment and an order denying his motion for a new trial, the defendant appeals.

It is argued by counsel for appellant, that the indorsement on the bill of sale does not constitute a guaranty of title of any of the property mentioned in the bill of sale. The complaint seems to be drawn in such manner as to justify recovery either for a breach of a warranty to deliver possession, or for a breach of a warranty of title. We may assume, without deciding, that the legal effect of the indorsement on the bill of sale is to guarantee delivery of possession of the property to Pincus, but the evidence is wholly insufficient to sustain the charge that there was any violation of that agreement or breach of that guaranty. The testimony shows that, when the indorsement was made, Muntzer was in possession of the property. Pincus took the bill of sale with the indorsement and immediately resold the property to one Hanson. The record wholly fails to show whether

Pincus took possession of the property, whether he attempted to do so, or whether, if he made such attempt, he was in any manner prevented from accomplishing his purpose. He states that he was informed that Orton had a claim on the pianos; that he notified Hanson of this claim; that he told Hanson to keep the pianos, and that he would stand between him and anyone claiming them; and, finally, that he had to pay the amount of the Orton judgment—about \$95, with the costs included. The only reasonable inference to be drawn from this testimony is that Pincus actually secured possession of the property, or, at least, that his grantee, Hanson, did so. In any event, there is absolutely nothing to show a failure on Muntzer's part to make delivery.

The other theory of the action is, that it seeks to recover damages for a breach of a warranty of title to the two pianos. But there is not any such warranty contained in the indorsement. As stated before, at most it can be said to amount to nothing more than a guaranty that possession of the property would be delivered by Muntzer to Pincus; and this is a wholly different matter from a warranty of title in Muntzer. If plaintiff must rely upon an oral agreement or an implied guaranty, his cause of action was barred long before this action was commenced.

But it may be said that the action proceeds upon the theory that the sale from Muntzer to Pincus was evidenced by an instrument in writing, and, although it does not contain any express warranty of title, the statute (Civil Code, sec. 2372) reads into it a warranty of title to the same extent as if the language of the statute had been written into the indorsement in full, and therefore the statute of limitations applicable is section 512 of the Code of Civil Procedure, and the period of eight years therein mentioned had not elapsed either from the date of the sale from Muntzer to Pincus, or from the date of the Orton judgment to the date of the commencement of this action. But section 512 above cannot be given a meaning to cover such a supposed case. The statute says that an action upon a contract, obligation, or liability founded upon an instrument in writing must be com-

menced within eight years. But the instrument in writing referred to must be one which, in itself, contains a contract to do the particular thing for the nonperformance of which the action is brought; in other words, that statute has no reference to an implied warranty. He who seeks to found his action upon an instrument in writing must show by express terms in the writing itself the very agreement the violation of which gives rise to his cause of action. (*Patterson v. Doe*, 130 Cal. 333, 62 Pac. 569; *McCarthy v. Mt. Tecarte L. & W. Co.*, 111 Cal. 328, 43 Pac. 956; *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899; 19 Ency. of Law, 2d ed., 272.)

As there is not any express warranty of title in the indorsement, plaintiff's cause of action was barred, so far as this theory of the case is concerned. We are not prepared, however, to say that, upon the other theory, a different showing might not be made upon another trial.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing decision.

BORDEN, RESPONDENT, v. LYNCH, APPELLANT.

(No. 2,333.)

(Submitted November 9, 1906. Decided November 26, 1906.)

*Conversion — Record — Appeal — Evidence — Sufficiency —
Mortgages — Cross-examination — Offer of Proof — Instruc-
tions.*

34	503
137	31
137	339
138	399
24	503
39	307

Trial—Amendments—Continuance—Judgment-roll.

1. Under sections 1151 and 1196 of the Code of Civil Procedure, an order permitting an amendment to the complaint and refusing a continuance, after the jury had been sworn, is a part of the judgment-roll.

Trial—Amendments—Continuance—District Courts—Discretion.

2. Applications for permission to amend a complaint after commencement of the trial, and for a continuance, are addressed to the discretion of the court.

Trial—Amendments—Continuance—Affidavits—Record.

3. Unless the affidavits embodying facts necessary to move the discretion of the court on applications for leave to amend a complaint after commencement of the trial, and for a continuance, are made part of the record by bill of exceptions, properly settled, they may not be considered on appeal.

Conversion—Damages—Evidence—Sufficiency—Appeal.

4. Where, in an action for damages for the conversion of personal property by a constable, the evidence, though conflicting as to the amount of damages sustained, would have warranted the jury in finding a much larger amount in favor of plaintiff than it did, the contention of defendant on appeal that the evidence was insufficient to sustain the verdict is without merit.

Same—Evidence—Fraud—Notes—Mortgages—Consideration—Appeal.

5. Where, in an action in conversion, there was no substantial evidence adduced tending to show that a note, and a mortgage given on the personal property in controversy to secure the former instrument had their inception in fraud and were not based on a consideration, although there were some inconsistencies as to the question of consideration, the verdict in favor of plaintiff will not be disturbed on appeal.

Appeal—Rulings on Evidence—Exceptions—Review.

6. Errors alleged to have been committed by the trial court in excluding offered testimony will not be considered on appeal, unless proper exceptions were reserved to the rulings or decisions complained of.

Conversion—Trial—Evidence—Cross-examination.

7. Plaintiff, in an action for damages for the conversion of certain personal property by defendant constable, testified that she was the owner of a mortgage on the property in question and a note secured thereby. On cross-examination she was asked what consideration she had given for the instruments. *Held* under section 3376 of the Code of Civil Procedure, that, while the rule announced in said section should be extended rather than restricted, it should not be extended

to matters not connected with the subject matter upon which the examination in chief was had, and that therefore cross-examination, in this instance, as to consideration or other circumstances which resulted in the execution of the note and mortgage had been properly excluded.

Trial—Witnesses—Cross-examination—Parties.

8. The rule that the cross-examination of a witness should be confined to matters deposed to in chief applies to parties as well as to other witnesses.

Trial—Witnesses—Examination.

9. For the district court to refuse a witness permission to answer a question, which had once before been answered, objection having been interposed, is not error.

Conversion—Evidence—Mortgages—Fraud—Offer of Proof—Scope.

10. In an action by a chattel mortgagee to recover for the conversion of the property by an officer who had levied thereon, defendant offered to prove by the attaching creditor that the mortgagor had told him shortly before the execution of the mortgage that she intended to execute it to prevent her other creditors from levying on her property. *Held*, that such offer was properly rejected for failure to include a tender of proof that plaintiff was cognizant of the fraudulent intent of the mortgagor in encumbering her property or had aided in its accomplishment.

Same—Notes—Mortgages—Consideration—Burden of Proof—Instructions.

11. An instruction, given in an action to recover damages for the conversion of certain personal property seized by defendant constable, that a note secured by a mortgage imported a valuable consideration, and that the burden of showing the want of consideration rested upon the party seeking to invalidate it, correctly stated the law, even though the mortgage was given to secure an antecedent debt.

Same—Mortgages—Insolvency—Instructions.

12. The fact that a chattel mortgagor was insolvent at the time she executed a mortgage on property in controversy in an action for damages for conversion did not of itself render the transaction fraudulent and void as against an attaching creditor, since an insolvent person may lawfully pledge his property to obtain loans or to secure an antecedent debt; and an instruction telling the jury, in substance, that, if they found that the mortgage was supported by a valid consideration and given in good faith to secure a debt actually due, the fact that the mortgagor was insolvent at the time she gave the mortgage was not presumptive proof of its fraudulent character, was correct.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

ACTION by Kate Borden against D. Lynch. From a judgment for plaintiff and from an order denying him a new trial, defendant appeals. Affirmed.

Mr. T. O'Leary, for Appellant.

When a controversy arises concerning a mortgagee's rights under a mortgage, with anyone interested in questioning it, he is

bound to prove the amount and condition of his claim. If he has rights he has the means, possessed by no other person, of explaining them, and he is bound to do so. (2 Cobbey on Chattel Mortgages, secs. 756, 760; *Hughes v. Cory*, 20 Iowa, 399; *Wallach v. Wylie*, 28 Kan. 138; *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994; *Smith v. National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616.) Misstatement of the amount due is an evidence of fraud. (2 Cobbey on Chattel Mortgages, secs. 783, 784, and cases cited; *Loomis v. Smith*, 37 Mich. 595; *Allen v. Kinyon*, 41 Mich. 281, 1 N. W. 863; *Olmstead v. Mattison*, 45 Mich. 617, 8 N. W. 555.)

The fact that just prior to the giving of the mortgage an attachment had been levied upon the property in question was a material fact in determining the intent with which the mortgage was made, and its exclusion was most prejudicial to the defendant, as it practically excluded any cross-examination of the mortgagor. It was material upon the question of the insolvency of the mortgagor at the time the mortgage was given. (*Eureka etc. Steel Works v. Brosnahan*, 66 Mich. 489, 33 N. W. 484; *O'Hare v. Duckworth*, 4 Wash. 470, 30 Pac. 725; *Landecker v. Houghtaling*, 7 Cal. 392; *Grimes v. Hill*, 15 Colo. 359, 25 Pac. 699; *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. 296.)

The respondent's testimony having negatived that a consideration had passed, the rule that the defendant should show by the preponderance of the evidence the want of consideration did not apply to this case and was error to so charge. (*Small v. Clewley*, 62 Me. 155, 16 Am. Rep. 410.)

Mr. J. H. Duffy, and *Mr. W. H. Trippett*, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for the conversion of certain personal property by the defendant as constable of Anaconda township, Deer Lodge county.

Plaintiff states her cause of action in two counts. After alleging the official capacity of the defendant, the complaint sets out in the first cause of action, in substance, that on July 10, 1905, one Elizabeth Nichols executed a promissory note to the plaintiff for the sum of \$850, payable one year after date with interest at the rate of one per cent per month, payable monthly; that, on the same day, to secure the payment of the same according to its terms, said Nichols executed and delivered to plaintiff a chattel mortgage upon certain personal property which was filed for record with the clerk and recorder of Deer Lodge county; that the plaintiff is the owner and holder of the note and mortgage, and that no part of said note has been paid; that, by the terms of the mortgage and note, the sum of \$854.81 became and was due from the said Nichols to plaintiff on July 27, 1905; that on that date, in an action brought in the justice's court of Anaconda township, wherein one Barich was plaintiff and the said Nichols defendant, a writ of attachment was issued and placed in the hands of the defendant, who seized thereunder the property described in the mortgage and took it into his possession; and that he neither paid nor tendered to plaintiff the amount of her note with interest, nor deposited the amount thereof with the county treasurer, nor did he himself pay the amount thereof though requested so to do, and further refused upon demand to release the property from the attachment.

The second cause of action, in addition to these facts, alleges that it was provided by the terms of said mortgage that, if the said Nichols defaulted in the payment of the principal of said note or any interest thereon according to its terms, or if, prior to its maturity, the property described in the mortgage or any part thereof should be seized under attachment or execution at the instance of any creditor of said Nichols, then, in either event, the plaintiff should be entitled to the immediate possession of all of the property; that, on July 27, 1905, the property was seized and attached at the instance of one Barich, creditor of said Nichols; that by reason of the seizure the plaintiff be-

came and was entitled to the possession thereof; that before the commencement of this action the plaintiff demanded possession of the defendant, and that he refused to deliver the same. Both causes of action allege that the property was, at the date of the seizure, of the value of \$884. Judgment is demanded for damages in that amount.

The answer admits the execution of the note and mortgage with the stipulations and conditions therein contained, and the seizure of the property by defendant at the instance of Barich, but denies every other material allegation in both causes of action. It alleges affirmatively that the note and mortgage were executed without consideration and for the purpose of hindering, delaying, and defrauding the creditors of said Nichols. There is issue by reply. The trial resulted in a verdict and judgment for the plaintiff. The defendant has appealed from the judgment and an order denying a new trial.

1. Contention is made that the court erred in permitting the plaintiff to amend her complaint after the jury were sworn, by adding an allegation, by interlineation, of the value of the property, and in refusing the defendant a continuance on the ground of surprise. There is nothing in the record to indicate upon what ground the defendant made his application for a continuance. We find in the record the order permitting the amendment and refusing the continuance. This is a part of the judgment-roll. (Code Civ. Proc., secs. 1151, 1196.) But the affidavits embodying facts necessary to move the discretion of the court, if such were presented and considered in support either of the amendment or of the motion for a continuance, are not incorporated in the record. Both applications were addressed to the discretion of the court, and, since there is nothing before us to enable us to say whether the court abused its discretion in either case, and the order is such as the court might have made, we cannot arbitrarily say that either ruling was erroneous.

Among the papers constituting the record we find an affidavit to which appellant refers as the showing upon which the application for a continuance was made. But it is not identified by bill

of exceptions and thus properly brought into the record as should have been done. It, therefore, may not be looked to for any purpose. Such matters can be made a part of the record only by bill of exceptions, properly settled. (*Carr, Ryder & Adams Co. v. Closser et al.*, 27 Mont. 94, 69 Pac. 560.)

2. Contention is made that the evidence is insufficient to justify the verdict. The amount of the damages found by the jury was \$350. While the evidence is conflicting on this issue, the jury would have been warranted in finding a much larger sum.

Touching the issue of fraud and want of consideration to support the note and mortgage, it is sufficient to say that there is no substantial evidence tending to show that the mortgage and note had their inception in fraud, and that, while there are some inconsistencies in the statements of the plaintiff and Elizabeth Nichols as to the amount of money advanced to the latter to secure the payment of which the mortgage was given, the evidence is sufficient to justify a finding that the note was given for the amount which was actually advanced before it and the mortgage were executed. We may not, under this condition of the evidence, disturb the finding of the jury.

3. Error is alleged upon many rulings made in excluding evidence offered by the defendant. In most instances counsel failed to reserve an exception to the particular ruling, as provided by section 1150 of the Code of Civil Procedure. For this reason such alleged errors may not be considered. We have examined all of those to which exceptions were properly reserved. In none of them do we find that the defendant suffered prejudice. For illustration: The plaintiff, being sworn as a witness, identified the mortgage and note, stated that she was the owner of them and that the defendant had not deposited the amount of the note with the county treasurer for her nor paid the same to her. On cross-examination she was asked for what consideration the note and mortgage had been given. Upon objection of her counsel, on the ground that it was not proper cross-examination, she was not permitted to answer. Being a party and having

offered herself as a witness, the defendant insisted that he had a right to cross-examine her as to all the circumstances connected with the execution of the note and mortgage, including the consideration.

The general rule in this country is that a witness may be cross-examined as to anything testified to by him in chief or connected therewith, but not as to other matters. (Code Civ. Proc., sec. 3376; 3 Jones on Evidence, sec. 820; *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *Braly v. Henry*, 77 Cal. 324, 19 Pac. 529; *McFadden v. Mitchell*, 61 Cal. 148; *Youmans v. Carney*, 62 Wis. 580, 23 N. W. 20; *Bell v. Prewitt*, 62 Ill. 361; *Houghton v. Jones*, 1 Wall. 702, 17 L. Ed. 503.) While the rule should be extended rather than restricted in its application, it may not be extended to include matters clearly not connected with the subject matter upon which examination in chief was had. The plaintiff having been asked only as to whether she was the owner of the note and mortgage, it was not proper on cross-examination to go into questions of consideration or other circumstances connected with the transaction which resulted in their execution, either on the ground that such matters were part of the *res gestae*, or that they were connected with matters deposed to in chief. (*Youmans v. Carney*, *Bell v. Prewitt*, *Braly v. Henry*, *McFadden v. Mitchell*, *supra*.) The rule applies as well to parties as to other witnesses. (*Hansen v. Miller*, 145 Ill. 538, 32 N. E. 548; *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927.)

The plaintiff was asked during her examination by defendant whether, when the mortgage and note were made, she did not know that an attachment had theretofore been levied upon the property by another creditor of Nichols. She answered that she did not. The question being repeated, she was not permitted to answer, counsel objecting that the matter sought to be brought out was immaterial. There was no error in this ruling. If the question was proper, it had already been answered. No advantage was to be obtained by a repetition.

Barich, the attaching creditor, introduced by the defendant, was asked if Nichols had not told him, a short time prior to the execution of the mortgage, that she intended to execute such mortgage, for the purpose of preventing her other creditors from levying on her property. Upon objection this evidence was excluded. Thereupon defendant offered to prove, in substance, by this witness, that just before the mortgage and note were given, Nichols had told him that she was about to give the mortgage to prevent other parties from levying upon her property, but that it was not her intention to defeat any claim he might have against her. The offered evidence was excluded and exception reserved. The offer was not broad enough. While the declarations of Nichols were competent to show her fraudulent intent in encumbering her property (Wigmore on Evidence, sec. 1086, par. 5), they could not affect the rights of plaintiff in the absence of proof that plaintiff was cognizant of her intent or aided her in its accomplishment. There was no proof of such knowledge on the part of the plaintiff, and, since the offer did not include a tender of such proof, the exclusion of the evidence was not prejudicial to the defendant. The right of the plaintiff could not be affected by any fraudulent intent entertained by Nichols, unless it appeared that she had knowledge of that fraudulent intent or aided the defendant in its accomplishment.

4. Among other instructions to the jury, the court submitted the following: "No. 5. The note set out in the complaint and introduced in evidence imports a valuable consideration, and it devolves upon the defendant in order to overthrow the note or mortgage for the lack of a consideration to show that fact by a preponderance of the evidence introduced in the case on that issue, and, if there was a valuable consideration for the note and mortgage, then the note and mortgage in that respect are valid, at least to the extent of the amount of the consideration, notwithstanding Mrs. Nichols may, at the time of their execution, have been indebted to other persons, or may have been insolvent." It is said that this instruction embodies an

erroneous statement of the law, in that it casts upon the defendant the burden of showing that the note and mortgage were without consideration. There is no merit in this contention. The writings themselves imported a consideration (Civil Code, sec. 2169), and "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it" (Civil Code, sec. 2170).

But it is said that Nichols, the mortgagor, and the plaintiff having admitted that no money actually passed between them at the time of the execution of the mortgage, a case was presented that relieved the defendant of this burden, and that, under the facts of this case, the burden rested upon the plaintiff to show a valid consideration. The proof tended to show that, for some time prior to the execution of the mortgage, the plaintiff had been advancing money to Nichols; that during March, 1905, Nichols secured additional loans amounting to \$410 from the plaintiff in order to enable her to purchase the property involved in this controversy from Barich and to make a payment of rent, and that, at the time she obtained the last sums, she agreed to execute the note and mortgage upon the property, to secure, not only the sums then advanced, but the sums theretofore advanced, but that the execution of them had been delayed by an unexpected absence from the state, so that the mortgage was in fact executed to secure the payment of an antecedent debt. The statute, however, declares the rule and must govern. If the defendant obtained the required proof from the plaintiff or her witnesses, to this extent he was fortunate in that he was relieved from the necessity of calling witnesses, but, nevertheless, the burden rested upon him to establish this affirmative allegation from some source. So far as concerns this portion of the instruction, we think it a correct statement of the law applicable, and that defendant has no cause to complain.

But it is said that the latter part of the instruction excluded from the jury's consideration the fact that, at the time the note and mortgage were executed, the mortgagor, Nichols, was insolvent. This contention has no merit. The fact that she was

insolvent, if such were the case, did not, in itself, render the transaction fraudulent and void as to the attaching creditor. An insolvent person may lawfully pledge his property to obtain loans or to secure an antecedent debt, and, if the creditor acts in good faith, he may not be deprived of the preference thus given him over other creditors, on the ground that his debtor was insolvent at the time. The effect of the instruction is not to exclude from the consideration of the jury the fact that the mortgagor was at the time of the execution of the mortgage insolvent, but rather, in view of the other instructions submitted, to tell them that, if they found that the mortgage was supported by a valid consideration and given in good faith to secure a debt actually due, the fact that the mortgagor was insolvent at the time was not presumptive proof that it was fraudulent. We think the instruction states the law correctly in this respect.

There being no error in the record, the judgment and order must be affirmed. It is so ordered.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing decision.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1906.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, }
 THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

PASSAVANT, APPELLANT, v. ARNOLD, RESPONDENT.

(No. 2,288.)

(Submitted October 6, 1906. Decided December 4, 1906.)

34	512
34	500
34	513
35	430

Appeal—Record—Sufficiency—New Trial Statement—Practice.

Appeal—Record—Evidence—New Trial Statement—Sufficiency.

1. Where a statement on motion for a new trial does not contain a recital that all, or the substance of all, the evidence adduced at the trial is incorporated in it, and the narrative of the proceedings is not so connected as to enable the supreme court on appeal to say that it affirmatively appears that such is the fact, the certificate of the judge attached to the statement not referring to the evidence at all, the sufficiency of the evidence to justify the findings of the court in a water right suit will not be reviewed.

Same—New Trial Statement—Practice—Record—Contents.

2. The better and safer practice for the party moving for a new trial is to insert in the statement a recital showing unequivocally that it contains all, or the substance of all, the evidence adduced at the trial, for in undertaking to construct a narrative of the proceedings so connected as to show affirmatively that such is the fact, he does so at his peril.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Walter Passavant against Walter W. Arnold. From a judgment and from an order denying a new trial, defendant appeals. Affirmed.

Messrs. Bach & Wight, and Mr. T. J. Walsh, for Appellant.

Messrs. Word & Word, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain a judgment quieting the title to the use of certain of the waters of Spokane creek in Lewis and Clark county. The right in controversy is based upon an appropriation of one hundred and eighty inches made by the defendant, which plaintiff claims he now owns under certain conveyances from defendant. One of these purports to convey a right to the use of one hundred and ten inches, statutory measurement, out of the headwaters of the stream and its upper tributaries, and was made directly to the plaintiff. As to the effect of this conveyance there is no controversy. The claim to the remainder of the right rests upon the construction of a certain bond for a deed executed by defendant to one Rohde to certain lands, together with one-half of the water and water right at the head of defendant's ditch, of a deed by defendant to one Semenec who became the assignee of the bond, and a deed from Semenec to the plaintiff. The bond referred to was executed prior to the date of the deed to the one hundred and ten inches, but the latter was taken without notice, and was first recorded. The issue tried was whether the defendant still owns one-half of the interest remaining after the first deed was executed.

The plaintiff, pleading and relying upon a final judgment rendered by the district court of Lewis and Clark county on

July 2, 1897, in a cause wherein the defendant was plaintiff and the plaintiff herein was one of the defendants (*Arnold v. Passavant*, 19 Mont. 575, 49 Pac. 400), by which the priorities of the respective rights of the parties to the use of the waters of the stream as they then existed were determined, assumed the position that the terms of these conveyances are clear and unambiguous, and that defendant was estopped by the judgment referred to, to dispute his right asserted under them. Defendant assumed the position that the terms of these conveyances are indefinite and ambiguous and, if construed and applied to the subject matter in the light of the attendant circumstances, they would sustain his claim of title. The court, upon the evidence adduced, found the issue in favor of the plaintiff. The defendant has appealed from the judgment and an order denying him a new trial. The sole question submitted by him is whether the evidence justifies the findings. He is met by an objection by plaintiff that this question cannot be considered, for the reason that it does not appear affirmatively that the record contains all of the evidence.

On appeal the presumption is that the action of the trial court is correct, and in order to overturn its judgment or decision it is incumbent upon the appellant to show affirmatively that error has been committed. (*Rumney L. & C. Co. v. Detroit etc. C. Co.*, 19 Mont. 557, 49 Pac. 395.) If substantial error is made apparent, prejudice will be presumed unless the record shows affirmatively that such error is not prejudicial. (*Parrin v. Montana C. Ry. Co.*, 22 Mont. 290, 56 Pac. 315.) If the error alleged is one of law, the record must show affirmatively the objectionable ruling, together with so much of the attendant proceedings as will make it apparent. If the ruling or decision does not belong to the class to which the statute reserves an exception (Code Civ. Proc., sec. 1151), the record must show an exception, properly reserved at the time by the appellant himself. If the error complained of be that the evidence is insufficient to sustain the findings or verdict, this court cannot, upon a review of the decision, declare it erroneous unless the record contains all

the evidence, incorporated therein as prescribed by the statute, and that it does so should affirmatively appear (*State v. Shepphard*, 23 Mont. 323, 58 Pac. 868; *Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711; *King v. Pony Gold M. Co.*, 28 Mont. 74, 72 Pac. 309); for the functions of this court being confined to a review of the proceedings had in the district court, the record in relation to the matter upon which review is sought, must be the same, so far as may be, as that upon which the district court acted. That it is the same this court cannot know except by affirmative proof, for the presumptions in this regard do not aid the appellant. To hold otherwise would be to disregard entirely the presumption of the correctness and regularity in favor of the particular ruling. The proof should be made by recital in the record itself.

Section 1155 of the Code of Civil Procedure provides what the certificate of the judge attached to the bill of exceptions or statement shall contain. It does not authorize any other statement than that "the same (the bill) is allowed." In *State v. Shepphard*, *supra*, it is said: "Where the bill of exceptions itself is relied on to show the insufficiency of the evidence, it should either set forth in express language that all the evidence, or the substance thereof, or so much thereof as is necessary to illustrate the point relied on, is all incorporated in the bill, or it should contain statements equivalent to such expressions, or it should show a whole connected narrative, so constructed that it clearly appears that all the material evidence, or the substance thereof, is incorporated in the bill." In another place in the opinion it is said, in substance, that it is sufficient if it appears from the certificate of the judge that the whole of the evidence is in the record. In view of what the statute provides, we doubt the technical correctness of this statement, and if this question were an open one we should hold differently. Inasmuch, however, as it is frequently the practice to have the judge certify that the record contains the evidence, encouraged no doubt by the statement referred to, we shall not now say that such practice is bad. The better rule is that the statement or bill itself should contain recitals showing unequivocally the facts. This

court went to the extreme limit of liberality in the case of *State v. Sheppard*, and if, as suggested therein may be done, the moving party undertakes to construct a narrative of the proceedings so connected as to show affirmatively that the record contains all the evidence, he does so at his peril. It is much easier and safer to have an express recital in the bill or statement itself.

In this case we find no recital in the statement; nor does the certificate of the judge refer to the evidence. The narrative of the proceedings is not so connected as to enable us to say from an examination of it that it affirmatively appears that all, or the substance of all, the evidence is incorporated in the statement. For this reason the objection of respondent must be sustained.

The result is that the judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

HAGGERTY BROTHERS, APPELLANTS, v. LASH & SHAUGHNESSY, RESPONDENTS.

(No. 2,320.)

(Submitted November 10, 1906. Decided December 4, 1906.)

Appeal—New Trial Statement—Review—Claim and Delivery—Measure of Damages—Instructions.

Appeal—Assignments of Error—New Trial Statement—Scope of Review.

1. Assignments of error on the giving and refusing of instructions which were not made in appellants' statement on motion for a new trial will be considered as though the record on appeal contained only the judgment-roll without the evidence.

Claim and Delivery—Measure of Damages—Instructions.

2. To instruct the jury, in an action in claim and delivery to recover possession of horses, wagons, etc., with damages for the wrongful detention of the same, that the measure of damages in such a case is "the value of the use of the property taken, from the time of the

taking of the same up to the present time," is error, since it fails to submit to the jury the proposition that from the gross earnings of the property in controversy the expense of feeding and taking care of it must be deducted, actual damages being all that may be recovered.

Same—Damages—Burden of Proof.

3. In an action in claim and delivery to recover the possession of horses, wagons, etc., plaintiff's title to which was denied and damages asked by defendants for a wrongful taking of the property by plaintiff, an instruction requested by the latter, that "a party who claims compensation for an alleged wrong done must show not only that he has suffered a loss on account of the injury, but also what was the amount of the loss, and the burden of proving these things is upon the party alleging the wrong," correctly stated the law, was applicable to the issues made and should have been given.

Same—Appeal—Disposition of Cause.

4. Where, in an action in claim and delivery, the issue of ownership was correctly determined, but instructions going to the question of damages claimed for the wrongful detention of the property in controversy were erroneously given and refused, the cause will be remanded for a new trial of the issue of damages only, and, after a determination of their amount, the judgment ordered modified accordingly.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

ACTION by Haggerty Brothers against Lash & Shaughnessy. From a judgment for defendants and an order denying their motion for a new trial plaintiffs appeal. Remanded.

Mr. Joseph J. McCaffery, and Mr. H. W. Rodgers, for Appellants.

Mr. W. H. Trippett, and Mr. J. H. Duffy, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action in claim and delivery brought by the plaintiffs, Haggerty Brothers, to recover the possession of certain personal property consisting of horses, wagons, etc., and for damages for the wrongful detention of the same. The complaint is in the usual form. The answer denies plaintiffs' title or right of possession to the property, and sets forth that on August 29, 1904, plaintiffs and defendants entered into an agreement in writing by the terms of which defendants purchased

the property in controversy from the plaintiffs for the sum of \$250, payable in installments. It was further agreed that defendants should haul three million feet of lumber for plaintiffs, for which they were to receive \$2.50 per thousand feet. The answer then alleges that defendants paid two installments on the purchase price of the property, but that on December 11, 1904, plaintiffs, in violation of the agreement, wrongfully compelled defendants to cease work, and thereby prevented them from fully carrying out the contract. The answer further alleges that on January 11, 1905, the plaintiffs wrongfully and maliciously caused the property to be taken from the possession of the defendants, to their damage in the sum of \$25 per day. The reply admits the execution of the contract of August 29, 1904, and that defendants paid \$150 on the purchase price of the property. Every other allegation in the answer is denied.

Upon the trial the court gave instruction No. 10, as follows: "If you find for the defendants in this action, you will assess their damages at the value of the use of the property taken by the plaintiffs from the time of the taking of the same, to-wit, January 17, 1905, up to the present time." And refused to give an instruction asked by the plaintiffs, as follows: "The court instructs the jury that a party who claims compensation for an alleged wrong done must show, not only that he has suffered a loss on account of the injury, but also what was the amount of the loss, and the burden of proving both these things is upon the party alleging the wrong."

The jury returned a verdict in favor of the defendants for the return of the property, and for \$300 damages for the wrongful taking and detention of it by the plaintiffs, and judgment was entered in accordance with the verdict. From this judgment and an order denying their motion for a new trial, the plaintiffs appeal.

In their brief appellants make these, among other, assignments of error: (1) The giving of instruction No. 10; and (2) the refusal of the court to give plaintiff's requested instruction above. These assignments, however, are not made in plaintiffs'

statement on motion for a new trial, and they are therefore to be considered as though this record contained only the judgment-roll without the evidence.

1. The objection made to instruction No. 10 is that it does not submit a correct rule or standard for determining the amount of damages. Whatever may be the decisions in other jurisdictions as to the correctness of such an instruction, it has been condemned by this court, and the giving of such an instruction has been declared to be prejudicial error. In *Brunnell v. Cook*, 13 Mont. 497, 34 Pac. 1015, a similar instruction was given, and, on appeal, this court said in effect that such an instruction submits to the jury the gross earnings of the property as the measure of damages for its wrongful detention, whereas the actual damages is all that should be recovered. In other words, from the gross earnings of the property there should be deducted the expense, if any, of feeding and caring for the property. For thirteen years the rule announced in *Brunnell v. Cook* has remained the law of this state upon the subject, and we are not now inclined to depart from it. Accepting that doctrine, then, this instruction is erroneous in any view of the case.

2. We think the court should have given plaintiff's requested instruction. It correctly states the law, and is applicable to the issues made; and, since the jury returned a verdict in favor of the defendants for damages for the wrongful detention of the property by plaintiffs, it must likewise have been applicable to the facts disclosed by the evidence.

We have examined the other assignments made, but do not find any merit in any of them. There appears to have been no error committed in determining the issue as to the ownership of the property. The errors with respect to the instructions mentioned above go to the question of damages. Therefore, following further the rule in *Brunnell v. Cook*, this cause will be remanded to the district court, with directions to grant a new trial of the issue as to defendants' damages for the wrongful detention of the property by plaintiffs, unless the parties can agree as to

the amount for which the judgment for damages should be entered.

When this issue is determined, the judgment will be modified accordingly.

Modified.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

O'NEILL, PLAINTIFF, v. STATE SAVINGS BANK ET AL., DEFENDANTS; GARDINER, INTERVENER AND RESPONDENT; PEIRIE, INTERVENER AND APPELLANT.

(No. 2,332.)

(Submitted November 13, 1906. Decided December 4, 1906.)

Principal and Surety—Appeal Bonds—Subrogation—Creditors—New Trial—Newly Discovered Evidence.

Appeal Bonds—Principal and Surety—Creditors—Subrogation.

1. In an action to recover on an appeal bond, where it appeared that a stranger to the original action had deposited in bank a sum of money to indemnify the sureties on the bond, the principle of subrogation, embodied in section 3700 of the Civil Code, creating in favor of the creditor a trust which attaches to the property of the principal debtor when sought to be appropriated to the benefit of the surety, may not be invoked by the creditor.

Appeal Bonds—Sufficiency—Failure to Except—Presumptions.

2. From a failure to except to the sufficiency of sureties on an appeal bond, the presumption arises that it was sufficient.

Appeal Bonds—Principal and Surety—Withdrawal of Indemnity—Who may Object.

3. Where a stranger to an action in which an appeal bond was required, deposited a sum of money to indemnify the sureties, no one but the sureties could object to the withdrawal of the indemnity; and, such objection not having been made, the court properly awarded the sum deposited to the heir of the deceased depositor.

District Court—Reopening Case—Discretion—Review.

4. To permit a case to be reopened for the purpose of hearing further proof in a civil case, lay within the discretion of the trial court, and its action in the premises is reviewable only in case of abuse of such discretion.

New Trial—Newly Discovered Evidence—Affidavit—Sufficiency.

5. An affidavit filed by an attorney in support of a motion for a new trial on the ground of newly discovered evidence, stating that he and opposing counsel had stipulated that the deposition of a witness, then out of the state, should be taken; that he relied upon such stipulation; that he asked counsel once where the witness could be found

and was informed he did not know but would ascertain; that he never received the desired information; and that neither he nor his client knew what the absent witness would testify to until after the trial, held insufficient to move the discretion of the court, where for a month prior to trial affiant and his client must have known, from a complaint filed in intervention, of the character and importance of the testimony of the witness, and where, if misled by opposing counsel, affiant did not make application for a continuance.

Same.

6. Where, from an affidavit filed in support of a motion for a new trial on the ground of newly discovered evidence, it did not appear that movant knew the whereabouts of a witness whose testimony was relied upon and that there was a reasonable probability that it could be secured if a new trial were granted, the district court cannot be said to have abused its discretion in refusing a new trial.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by William O'Neill against the State Savings Bank and others, Nellie Gardiner and James Peirie intervening. From a judgment for intervener Gardiner, and an order denying him a new trial, intervener Peirie appeals. Affirmed.

Mr. John J. McHatton, for Appellant.

It was claimed in the court below that, by reason of the appeal bond given to the supreme court, the bond on appeal from the justice's court was released, but such is not the law. (*Shannon v. Dodge*, 18 Colo. 164, 32 Pac. 61; *Rockwell v. District Court*, 17 Colo. 118, 31 Am. St. Rep. 265, 29 Pac. 454; *Marquette County v. Ward*, 50 Mich. 174, 15 N. W. 70; *Babbitt v. Finn*, 101 U. S. 7, 25 L. Ed. 820.)

The moment the judgment against Kellogg became final, the sureties on the bond were liable. (Civil Code, secs. 3630, 3631, 3655; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2; *Botkin v. Kleinschmidt*, 21 Mont. 1, 5, 69 Am. St. Rep. 641, 52 Pac. 563; *Tuttle v. Hardenberg*, 15 Mont. 219, 38 Pac. 1070; *People v. Penniman*, 37 Cal. 271; *Wood v. Orford*, 56 Cal. 157; *Nichols v. Dunphy*, 58 Cal. 605.)

Although a demand was made, this was not necessary before bringing suit or before the liability of the sureties arose. (*Nelson v. Donovan*, 16 Mont. 85, 86, 40 Pac. 72.) A refusal or neglect to pay is a breach of an appeal bond. (*Ryan v. Kinney*, 2

Mont. 454, 457.) The terms of the bond are binding upon the parties, and the bond was for the payment of "the amount of the judgment appealed from and all costs if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against them in said action in the district court aforesaid, not exceeding the sum of \$867." The terms of the bond, therefore, control. (*Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115; *Riddell v. Peck-Williamson H. & V. Co.*, 27 Mont. 44, 57, 69 Pac. 241, 242; *Bullard v. Smith*, 28 Mont. 387, 399, 72 Pac. 761, 763; *Gaffney Merc. Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561; *Sanford v. Gates, Townsend & Co.*, 21 Mont. 277, 289, 53 Pac. 749, 753.)

Where a surety takes or receives a deposit or security on account of the obligation which he has assumed, the same, in equity, inures to the benefit of the creditor. The surety is entitled to pay the same in discharge of the obligation, or the creditor is entitled to have the court award the same to him in satisfaction, or part satisfaction, thereof, and we submit the following as absolutely sustaining appellant's right: Civ. Code, secs. 3654, 3656; *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. 716, 19 L. R. A. 367; *Van Orden v. Durham*, 35 Cal. 136; *South Omaha Nat. Bank v. Wright*, 45 Neb. 23, 63 N. W. 126; *First Nat. Bank v. Wheeler*, 12 Tex. Civ. App. 489, 33 S. W. 1093; *Durham v. Craig*, 79 Ind. 121; *Webster v. Mitchell*, 22 Fed. 869, 870; *Meeker v. Waldron*, 62 Neb. 689, 87 N. W. 539; *Union Nat. Bank v. Rich*, 106 Mich. 319, 64 N. W. 339; *Lindsay v. Morse*, 129 Mich. 350, 88 N. W. 881; *Nourse v. Weitz*, 120 Iowa, 708, 95 N. W. 251; *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St. Rep. 610, 90 N. W. 993; *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913; *Crim v. Fleming*, 101 Ind. 154; *Johnson v. Bartlett*, 17 Pick. (Mass.) 477; *Myres v. Yapple*, 65 Mich. 403, 32 N. W. 442; 24 Am. & Eng. Ency. of Law, 1st ed., 815.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

James Peirie commenced an action in the justice of the peace court in Silver Bow county in 1897 against William O'Neill, and

George F. Kellogg, and such proceedings were had that plaintiff recovered a judgment against the defendants for \$297.80 and costs. The defendants thereupon appealed to the district court and executed an undertaking on appeal in the sum of \$867, conditioned as required by section 1763 of the Code of Civil Procedure. This was a joint and several undertaking and was signed by O'Neill and Kellogg as principals, and Robert Julien and P. A. Largey as sureties. In order to indemnify the sureties, the sum of \$700 was deposited in the State Savings Bank. Such proceedings were had in the district court that a judgment was returned in said cause in favor of plaintiff Peirie and against the defendant Kellogg. Thereafter Kellogg prosecuted an appeal to the supreme court of Montana, but, on motion of respondent, this appeal was dismissed. Peirie then prosecuted an action against the surety Robert Julien and recovered a judgment, but no part of the judgment so recovered has ever been paid, neither has any part of the judgment recovered by Peirie against Kellogg been paid. O'Neill brought this action against the State Savings Bank to recover the \$700 deposited with said bank to indemnify Largey and Julien. Peirie filed a complaint in intervention in which he seeks judgment against O'Neill on account of his having signed the undertaking on appeal from the justice of the peace court to the district court, and seeks to subject to the satisfaction of such judgment the \$700 deposited with the State Savings Bank. Nellie Gardiner (*nee* O'Rourke) also filed a complaint in intervention, in which she alleges that of the \$700 deposited in the State Savings Bank, the sum of \$350 was deposited by Robert Julien; that thereafter Julien withdrew his \$350 of said \$700, and that her father, Charles O'Rourke, deposited \$350 with said bank in lieu of the like amount withdrawn by Julien and for the same purpose for which the original sum was deposited, and that she is now entitled to recover this \$350 so deposited by her father.

The defendant State Savings Bank made answer disclaiming any interest in the money in controversy, was permitted to deposit the same in the court, and was discharged from the case.

Issues were joined by the plaintiff O'Neill, and the interveners Peirie and Gardiner. The cause was tried to the court sitting without a jury. The court found that Peirie recovered judgment in the justice of the peace court against O'Neill and Kellogg; that an appeal was taken by the defendants to the district court; that the appeal bond was executed by O'Neill and Kellogg as principals, and Julien and Largey as sureties; that O'Neill and Julien deposited the \$700 in the bank to indemnify Julien and Largey against any loss by reason of their having signed the undertaking on appeal; that afterward Julien withdrew \$350 of said amount, and Charles O'Rourke, a stranger to the former transactions, deposited the like amount in lieu thereof and for the like purpose; that O'Rourke, or Nellie Gardiner (*nee* O'Rourke), was to be repaid this \$350, if not necessary to indemnify the bondsmen. The court also found that no part of the judgment recovered by Peirie against Kellogg has ever been paid, and that O'Neill has no property within the jurisdiction of the court, except his interest in the \$700 on deposit. From the findings of fact the court concluded that one-half of the \$700 is a trust fund to which Peirie may resort for satisfaction of his claim, and that the other half, not being necessary to indemnify Largey and Julien, is the property of the intervener Nellie Gardiner, and judgment in her favor for that amount was duly entered, from which judgment, and an order denying his motion for a new trial, the intervener Peirie appeals. We have not been aided by any brief on behalf of respondent Gardiner.

At the time of the trial of this cause the judgment in favor of Peirie and against Kellogg amounted to more than the \$700. The contention of the appellant is that the money deposited in the bank to indemnify the sureties Julien and Largey inured to his benefit, and that the whole amount should have been awarded to him in satisfaction, or part satisfaction, of his claim. The trial court was not entirely accurate in its finding of fact No. 4, that the \$350 deposited by O'Rourke was to be paid to him or Nellie Gardiner, if not necessary to indemnify said bondsmen. The testimony shows that the \$350 deposited by O'Rourke in

lieu of the like amount withdrawn by Julien was to be paid back to O'Rourke, or Nellie Gardiner, "if O'Neill wins suit and bondsmen are released." The suit referred to was the one by Peirie against O'Neill and Kellogg, then on appeal to the district court. The testimony respecting the deposit made by O'Rourke was introduced over the objection of this appellant, and complaint is now made of this ruling of the trial court. But we think the ruling was correct. A material question for determination was, Who furnished the indemnity to Julien and Largey? That the \$700 was deposited with the State Savings Bank to indemnify and save harmless Julien and Largey on account of their having become sureties on the appeal bond admits of no doubt. The evidence also appears to be sufficient to support the finding of the court that in April, 1898, Julien withdrew the \$350 deposited by him, and O'Rourke deposited a like amount in lieu thereof and for the same purpose as the original deposits were made.

Appellant invokes the rule of equity jurisprudence stated by Pomeroy as follows: "The doctrine and remedy of subrogation are extended also to the creditor, who is subrogated to and entitled to the benefit of all securities given to a surety for purposes of his indemnification by the principal debtor; and also between co-sureties, so that one surety, in enforcing his rights of exoneration and of contribution, is subrogated to securities given to his co-surety." (3 Pomeroy's Equity Jurisprudence, sec. 1419.) The same general rule is embodied in our Code. Section 3700 of the Civil Code reads as follows: "A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction." The difficulty which confronts the appellant is that this general rule stated by the text-writers and by our Code is not applicable to the facts presented by this appeal. The rule rests upon the principle of natural equity, which requires that property, in whatever form it may be, of him who is primarily liable for the payment of the debt shall be applied to the payment of the debt to

the exoneration of one who is only secondarily liable. It is the principle of subrogation, which creates in favor of the creditor a trust which attaches to the property of the principal debtor the moment it is appropriated to the benefit of the surety. (1 Brandt on Suretyship and Guaranty, sec. 360, note.) But, in any event, the rule so declares, and the principle above presupposes that the indemnity was furnished by the principal debtor. Where, however, the indemnity is furnished to the surety by a stranger, a trust does not attach in favor of the creditor, and he cannot be subrogated to the surety's rights. (1 Brandt on Suretyship and Guaranty, sec. 361.)

It was no fraud upon the creditor that O'Rourke should indemnify Julien and Largey, or either one of them. The appeal bond was amply sufficient when signed by Kellogg and O'Neill as principals, and Julien and Largey as sureties—at least, this is the legal presumption arising from a failure to except to the sufficiency of the sureties—and therefore no one could complain that O'Rourke, who was not liable at all on account of the judgment or the appeal bond, should indemnify the sureties, or, having once indemnified them, with their consent should withdraw the indemnity. There is no principle of natural justice which would apply O'Rourke's property to the discharge of O'Neill's liability except upon the precise condition upon which the property was appropriated, namely, that Julien or Largey should be compelled to pay on account of having signed the appeal bond. As O'Rourke's property was not liable to the discharge of O'Neill's liability, no one but the sureties could complain against the withdrawal of the indemnity at any time, either by O'Rourke in his lifetime, or by his daughter, the intervener Gardiner, and, as the sureties are offering no resistance, the court properly awarded the O'Rourke \$350 to the intervener Gardiner. (*Leggett v. McClelland*, 39 Ohio St. 624; *Macklin v. Northern Bank*, 83 Ky. 314; *Taylor v. Farmers' Bank*, 87 Ky. 398, 9 S. W. 240; *Black v. Kaiser*, 91 Ky. 422, 16 S. W. 89; *Magoffin v. Boyle Nat. Bank*, 24 Ky. Law Rep. 585, 69 S. W. 702; *Hampton v. Phipps*, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719.)

That intervenor Gardiner is entitled to this \$350 deposited by O'Rourke, if O'Rourke in his lifetime was entitled to the same, is not controverted. Strictly speaking, the court's conclusion of law No. 4 should have been to the effect that the money deposited by O'Rourke, a stranger to the proceedings theretofore, did not inure to the benefit of the intervenor Peirie, and, as neither surety objected to its withdrawal, it should be awarded to the intervenor Gardiner, its rightful owner. But no one is prejudiced by the inaccurate statement in the court's conclusion and therefore it need not be reformed.

It was within the discretion of the trial court to permit the case to be reopened and the witness Hodgens to be called, and we do not think any abuse of such discretion is shown in this record.

One of the grounds of appellant's motion for a new trial was newly discovered evidence, and this was supported by the affidavit of J. J. McHatton, attorney for appellant. This affidavit sets forth that, after intervenor Gardiner filed her complaint in intervention, the attorney for the plaintiff arranged with him to stipulate to take the deposition of plaintiff O'Neill, who was then somewhere in California; that affiant relied upon attorney for plaintiff to take such deposition; that he asked attorney for plaintiff where plaintiff was and was informed that his attorney did not know his exact location but would ascertain; that plaintiff's attorney never informed affiant of O'Neill's exact whereabouts; that neither Peirie nor his attorney knew to what O'Neill would testify, but after this trial they were informed that O'Neill would testify that the \$350 deposited by O'Rourke was a loan to O'Neill and was actually O'Neill's money; and finally, that from the date of the filing of Gardiner's complaint in intervention to the date of the trial "there was not sufficient time to investigate and locate said O'Neill and ascertain what he would testify to with reference to the deposit," etc. But on its face this affidavit is not sufficient. For a month before the trial, Peirie and his attorney knew that O'Neill claimed the entire \$700 as his own, and that intervenor Gardiner claimed \$350 of it as

her own. O'Rourke was dead, therefore the people who would most likely know the truth respecting this deposit by O'Rourke were O'Neill and the persons actively employed in the bank. If intervenor Peirie relied upon O'Neill's attorney to take his deposition and expected by proper cross-interrogatories to ascertain from O'Neill the facts, and was misled by plaintiff's attorney, possibly a proper application to the trial court for a continuance would have been granted; but no such application was made. Peirie went to trial and took his chances of winning without the testimony of O'Neill, and now, having been defeated, he asks to have an opportunity to present such testimony upon another trial. But with the facts before him as presented by the complaint of O'Neill, which claimed the \$700, and the complaint in intervention of Gardiner, which claimed \$350 of the same money, Peirie ought not to have relied upon plaintiff's attorney to take O'Neill's deposition, but ought to have proceeded to secure the same himself. At most, the affidavit states that affiant made inquiry *once* as to O'Neill's whereabouts, and in the absence of any showing of an attempt to find O'Neill, we do not deem conclusive the statement that there was not sufficient time to locate him. From the allegations in his complaint, O'Neill was the one person to whom Peirie would naturally have turned first to disprove intervenor Gardiner's claim.

It does not appear from the affidavit that, if a new trial should be had, there is any reasonable probability that the testimony of O'Neill could be secured—in fact, it does not appear that appellant knows where O'Neill can be found. Under these circumstances we think the trial court cannot be said to have abused its discretion in refusing a new trial.

No error appearing, the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

Rehearing denied January 12, 1907.

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statement on motion for a new trial, and they are therefore to be considered as though this record contained only the judgment-roll without the evidence.

1. The objection made to instruction No. 10 is that it does not submit a correct rule or standard for determining the amount of damages. Whatever may be the decisions in other jurisdictions as to the correctness of such an instruction, it has been condemned by this court, and the giving of such an instruction has been declared to be prejudicial error. In *Brunnell v. Cook*, 13 Mont. 497, 34 Pac. 1015, a similar instruction was given, and, on appeal, this court said in effect that such an instruction submits to the jury the gross earnings of the property as the measure of damages for its wrongful detention, whereas the actual damages is all that should be recovered. In other words, from the gross earnings of the property there should be deducted the expense, if any, of feeding and caring for the property. For thirteen years the rule announced in *Brunnell v. Cook* has remained the law of this state upon the subject, and we are not now inclined to depart from it. Accepting that doctrine, then, this instruction is erroneous in any view of the case.

2. We think the court should have given plaintiff's requested instruction. It correctly states the law, and is applicable to the issues made; and, since the jury returned a verdict in favor of the defendants for damages for the wrongful detention of the property by plaintiffs, it must likewise have been applicable to the facts disclosed by the evidence.

We have examined the other assignments made, but do not find any merit in any of them. There appears to have been no error committed in determining the issue as to the ownership of the property. The errors with respect to the instructions mentioned above go to the question of damages. Therefore, following further the rule in *Brunnell v. Cook*, this cause will be remanded to the district court, with directions to grant a new trial of the issue as to defendants' damages for the wrongful detention of the property by plaintiffs, unless the parties can agree as to

the amount for which the judgment for damages should be entered.

When this issue is determined, the judgment will be modified accordingly.

Modified.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

O'NEILL, PLAINTIFF, v. STATE SAVINGS BANK ET AL., DEFENDANTS; GARDINER, INTERVENER AND RESPONDENT; PEIRIE, INTERVENER AND APPELLANT.

(No. 2,332.)

(Submitted November 13, 1906. Decided December 4, 1906.)

Principal and Surety—Appeal Bonds—Subrogation—Creditors—New Trial—Newly Discovered Evidence.

Appeal Bonds—Principal and Surety—Creditors—Subrogation.

1. In an action to recover on an appeal bond, where it appeared that a stranger to the original action had deposited in bank a sum of money to indemnify the sureties on the bond, the principle of subrogation, embodied in section 3700 of the Civil Code, creating in favor of the creditor a trust which attaches to the property of the principal debtor when sought to be appropriated to the benefit of the surety, may not be invoked by the creditor.

Appeal Bonds—Sufficiency—Failure to Except—Presumptions.

2. From a failure to except to the sufficiency of sureties on an appeal bond, the presumption arises that it was sufficient.

Appeal Bonds—Principal and Surety—Withdrawal of Indemnity—Who may Object.

3. Where a stranger to an action in which an appeal bond was required, deposited a sum of money to indemnify the sureties, no one but the sureties could object to the withdrawal of the indemnity; and, such objection not having been made, the court properly awarded the sum deposited to the heir of the deceased depositor.

District Court—Reopening Case—Discretion—Review.

4. To permit a case to be reopened for the purpose of hearing further proof in a civil case, lay within the discretion of the trial court, and its action in the premises is reviewable only in case of abuse of such discretion.

New Trial—Newly Discovered Evidence—Affidavit—Sufficiency.

5. An affidavit filed by an attorney in support of a motion for a new trial on the ground of newly discovered evidence, stating that he and opposing counsel had stipulated that the deposition of a witness, then out of the state, should be taken; that he relied upon such stipulation; that he asked counsel once where the witness could be found

Mr. John J. McHatton, for Respondent.

The existence of such an excavation as the one in question, without protection to travelers along the sidewalk, constituted a nuisance and rendered the city liable for injuries resulting therefrom, if it had notice of the existence thereof, or had means of knowledge which amounted to notice. (*City of Oklahoma City v. Myers*, 4 Okla. 686, 46 Pac. 552, and cases therein cited; 24 Am. & Eng. Ency. of Law, 1st ed., 94; Elliott on Streets and Roads, 447, 454; Jones on Negligence of Municipal Corporations, sec. 84, p. 160; Dillon on Municipal Corporations, sec. 1024, note; *Bassett v. City of St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446, 451; *Clark v. City of Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369; *Warner v. Inhabitants of Holyoke*, 112 Mass. 362; *Niblett v. City of Nashville*, 12 Heisk. (Tenn.) 684, 27 Am. Rep. 755; *Oliver v. City of Worcester*, 102 Mass. 489; *Fitzgerald v. City of Berlin*, 51 Wis. 81, 37 Am. Rep. 814, 7 N. W. 836; *Leonard v. City of Butte*, 25 Mont. 410, 65 Pac. 425; *Snook v. City of Anaconda*, 26 Mont. 128, 66 Pac. 759; *May v. City of Anaconda*, 26 Mont. 140, 66 Pac. 759; *Metz v. City of Butte*, 27 Mont. 506, 71 Pac. 761; *Meisner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130.)

The issuance of a permit by the city to the owner of a lot to make an excavation is sufficient evidence of knowledge on the part of the city of the existence of such excavation. (*Sutton v. City of Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273. See, also, *City of Kansas City v. Manning*, 50 Kan. 373, 31 Pac. 1104; *Zettler v. City of Atlanta*, 66 Ga. 195; *Beall v. City of Seattle*, 28 Wash. 593, 92 Am. St. Rep. 892, 69 Pac. 12, 61 L. R. A. 583.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a personal injury alleged to have been suffered by the plaintiff through the negligence of the defendant.

The cause of action alleged is, in substance, that during the month of July, 1901, on the east side of North Main street of the defendant, there was an excavation, several feet in depth, immediately adjoining the east line of the sidewalk; that the existence of the excavation, if left unguarded, rendered travel along the sidewalk unsafe and dangerous; that the defendant, with knowledge of the unsafe condition, negligently permitted it to continue by failing to erect sufficient or any barriers to protect passengers from falling into the excavation or to place danger signals thereat to warn them of the danger; that on the night of July 23, 1901, the plaintiff, while traveling along the sidewalk in the darkness, without knowledge or sight of the danger and without warning, stepped or fell into the excavation, striking with great force upon the bottom thereof, by reason of which fall he suffered great external and internal injury by being cut and bruised about the head, by having a tooth knocked out, and by being bruised and injured about his leg and body, whereby he not only suffered great pain for the time, but was permanently injured. Judgment for \$3,000 is demanded. The defense is a general denial. The plaintiff had verdict for \$1,000. Defendant has appealed from the judgment and an order denying it a new trial. Complaint is made that the instructions submitted to the jury are erroneous, and that the verdict is contrary to the evidence.

1. Taking the charge as a whole, it fully and fairly instructed the jury as to the law applicable to the facts appearing in evidence. No substantive error is pointed out in any of them. The criticisms made of the paragraphs complained of are too technical to warrant special notice. For example: In paragraph 11, in enumerating the elements which should be taken into consideration by the jury in fixing the amount of recovery in case they should find for the plaintiff, the court said: "Such sum as will compensate him for any pain or suffering which he has endured, as a result of any injury which he has sustained, up to the present time, if you find from the evidence that he has sustained injury and find therefrom that he has suffered any pain."

It is said that this directed the jury to compensate the plaintiff for any injury sustained prior to the time of the trial, whether through the negligence of the defendant or not. Since the inquiry was as to the injury alleged in the complaint, the evidence was properly directed to ascertain the facts and circumstances attending it and no other. There was nothing in the evidence tending to show that the plaintiff had suffered any other injury. Hence the jury must have understood that the clause "up to the present time" had no reference to the injury, but to the suffering and pain endured, and therefore it could not have misled them.

2. The principal contention made as to the insufficiency of the evidence is that it fails to show that the defendant had actual or constructive notice of the existing condition, and therefore that it was not chargeable with negligence. We shall not undertake to determine whether or not a sufficient case was made to go to the jury as to notice. At the place where the accident occurred building operations were going on, and the excavation was made necessary thereby. There is some evidence to the effect that the excavation had been in existence for three days, or perhaps more, before the accident occurred. During the trial it was stipulated that the city has a street commissioner with an assistant, and a chief of police, whose duty it is to look after the streets. There were then introduced certain ordinances of the defendant, ostensibly to show a specific definition of their duties. For some reason these were omitted from the statement. If, therefore, it be conceded that the evidence in the record, including the stipulation, does not make out a case from which notice might be presumed, as the defendant contends, we cannot venture to speculate as to what are the requirements of the ordinances. So far as our knowledge goes, the requirements of these may be such as to make it the duty of these officers or other employees of the city to make daily inspections of the streets and sidewalks and give special attention to buildings in course of erection or repair. In any event, this court may not review the evidence in order to determine its sufficiency, if the record does not show affirmatively that it is, in substance at least, all before it.

It is further said that the evidence is not sufficient to sustain a verdict for \$1,000. It does justify a verdict for some amount. It shows that the plaintiff fell a distance of seven or eight feet; that he was severely cut on the head; that he had one tooth knocked out and another broken; that he was bruised in the hips and suffered other like injuries. Upon the assumption that the defendant is liable at all, these injuries alone warranted a recovery of more than nominal damages; and, since the defendant does not itself insist that the amount awarded by the jury is excessive, we may not say that it is.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. BLOOMINGTON LAND AND LIVE STOCK
CO., RELATOR, v. DISTRICT COURT OF THE TENTH
JUDICIAL DISTRICT ET AL., RESPONDENTS.

34	535
41	70

(No. 2,366.)

(Submitted November 12, 1906. Decided December 8, 1906.)

*Railroads—Eminent Domain—Extent of Power—Streams—
Changing Channel—Supervisory Control.*

Railroads—Eminent Domain—Selection of Route—Who may not Complain.

1. When a railway company has selected a route for its railroad, under the statutes granting it the power, which it deems most advantageous, one claiming to have been injured by such selection may not be heard to say that another route could have been chosen.

Same—Eminent Domain—Streams—Changing of Channel.

2. A railway company has the right to select a route for its road which it deems most advantageous, and where a river interferes with such route, it has the power to secure land necessary for its use in constructing and maintaining the road on such route in such manner as to afford security for life and property.

Same—Eminent Domain—Extent of Power—Limitations.

3. A railway company may acquire any land necessary for the construction and maintenance of its road and its adjuncts and appendages, under subdivision 3 of section 894, Civil Code, by purchase or by vol-

untary grant or donation, or by condemnation proceedings, under section 526 of the same Code, subject only to the limitations that the right of way shall not exceed two hundred feet in width, except where a greater width is required for excavations and embankments, and that the land for excavations, embankments, sidetracks, turnouts, shops, etc., shall not exceed the amount necessary for such uses and purposes.

Same—Eminent Domain—Streams—Changing of Channel—Part of Construction of Road.

4. *Held*, that the changing of the channel of a stream, which would otherwise have to be crossed by a railway to conform to the route selected by it, when necessary to make the road secure for life and property, is a part of the construction of the road, within the meaning of the statute.

Same—Eminent Domain—Streams—Changing of Channel—Supervisory Control.

5. The changing of the channel of a stream, when necessary to make a railroad secure for life and property, being a part of the construction of the road, within the meaning of the statute, the land necessary to make such change may be secured by the company, and the writ of supervisory control will not issue to annul an order of the district court appointing appraisers to determine the compensation to the owners of the land sought to be condemned.

ORIGINAL proceedings by the state on the relation of the Bloomington Land and Live Stock Company for a writ of supervisory control to the district court of the tenth judicial district for the county of Meagher, and Honorable E. K. Cheadle, judge thereof, to annul an order in condemnation proceedings by the Chicago, Milwaukee and St. Paul Railway Company of Montana. Proceedings dismissed.

Mr. Fred H. Hathhorn, and Mr. Harry A. Groves, for Relator.

In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to delegation of the power of the legislature to private corporations. (Lewis on Eminent Domain, 2d ed., sec. 254.)

Since this is so, the prescribed mode for condemning private property should, within all reasonable limits, be inflexibly adhered to and applied. (*Payne v. Kansas etc. Ry. Co.*, 46 Fed. 546; *Western Union Tel. Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312.) In the absence of an express authority granted by statute there has been considerable question whether or not a railroad has power to cross or follow a public highway, navigable stream, or other railroad. (Elliott on Railroads, secs. 966, 973, 1099, 1102, 1105; *Illinois Cent. Ry. Co. v. City of Chicago*, 176 U. S. 664, 20 Sup. Ct. 509, 44 L. Ed. 629; Lewis on Eminent Domain, 2d ed., 270, 270a.) This is upon the theory that property devoted to a public use cannot be taken for another in the absence of express statutory authority.

A railway in this state, in laying out its line of road, may appropriate for the purpose of constructing and maintaining the same such land as is absolutely necessary, but in no case to exceed two hundred feet, except for the purpose of excavation or embankment. In thus laying out their road it may cross or follow any stream of water, and in crossing the same divert it from its present bed or location, all of which must be upon the condition that the usefulness of the stream be not impaired. The stream may be diverted for the purpose of enabling the railway to construct its line of road. For the purpose of constructing its line of road the railway cannot appropriate a strip exceeding in width two hundred feet. Hence it cannot exceed this width for the purpose of diverting the channel of the stream and securing its right of way.

Mr. M. S. Gunn, for Respondents.

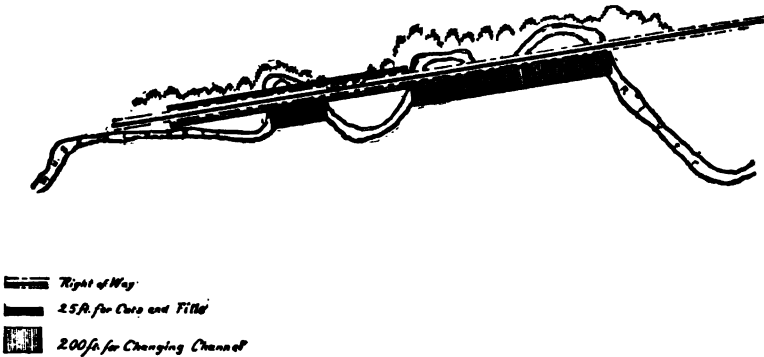
MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Chicago, Milwaukee and St. Paul Railway Company of Montana, having surveyed a route for a line of railroad and

a telegraph line from a point on the eastern boundary line of Montana, in Custer county, through the state to a point on the western boundary line, in Ravalli county, which route passes through the ranch of the Bloomington Land and Live Stock Company, in Meagher county, and, having failed to agree with the land company upon the damages to be paid for the land sought by the railway company, commenced proceedings in condemnation in the district court.

The railway company seeks to secure a strip of land one hundred feet in width for a right of way, certain strips twenty-five feet in width in addition thereto for cuts and fills, and also a strip of two hundred feet in width for the purpose of changing the channel of the Musselshell river. A complaint was filed by the railway company setting forth the facts relative to its use for the lands sought to be acquired. The defendant land company appeared and filed a demurrer, which was overruled, and, after a hearing had before the judge of the court, an order was made appointing appraisers to determine the compensation to be paid by the railway company on account of the taking of the several pieces or parcels of land sought. Thereafter the commissioners made a report as required by law, and the railway company paid into court for the land company the amounts so fixed by the commissioners as compensation. Thereupon the land company applied to this court for a writ of supervisory control to annul the order overruling the demurrer of the land company, and also the order of the judge appointing commissioners. An order to show cause was issued, and, upon the return, the matter was submitted to this court upon the petition filed herein, and a demurrer thereto interposed on behalf of the district court and the judge thereof.

The question submitted for determination is: Did the railway company seek to acquire land which it is not entitled to acquire by the exercise of the right of eminent domain? The subjoined map or diagram shows the situation presented by this application.



That the railway company could acquire, by condemnation, the land sought for a right of way one hundred feet in width is not controverted. We are now asked to determine whether it may also invoke the aid of the power of eminent domain to acquire land in addition to the right of way for cuts and embankments, and for the purpose of changing the channel of the Musselshell river. This question must be determined from the provisions of our Civil Code and Code of Civil Procedure, the portions of which directly applicable are as follows:

Civil Code, section 526: "No corporation shall acquire or hold any more real property than may be reasonably necessary for the transaction of its business, or the construction of its works, except as otherwise specially provided. A corporation may acquire real property as provided in the Code of Civil Procedure, Title VII, Part III."

Section 890: "Any railroad corporation shall be authorized to locate, construct, maintain and operate a railroad with a single or double track, with such side tracks, turnouts, machine shops, offices and depots as may be necessary between any points it may select within the places named in the articles of incorporation as termini of such road," etc.

Section 894: "Every railroad corporation has power: 1. To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes their officers, agents, and em-

ployees may enter upon the lands or waters of any person, subject to liability for all damages which they do thereto.

"2. To receive, hold, take, and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property which may be made to it to aid and encourage the construction, maintenance, and accommodation of such railroad.

"3. To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold, and use all such real estate and other property as may be absolutely necessary for the construction and maintenance of such railroad, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of the road.

"4. To lay out its road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same.

"5. To construct their [its] road across, along, or upon any stream of water, water course, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch or flume, which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness, as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise. 6. * * *

"7. To purchase lands, timber, stone, gravel, or other materials, to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in Title VII, Part III, Code of Civil Procedure, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the directors so determine, as is provided hereinafter; but no such

change must vary the general route of such road, as contemplated in its articles of incorporation. 8. * * *

“9. To erect and maintain all necessary and convenient buildings, stations, depots, fixtures, and machinery for the accommodation and use of their passengers, freight and business.”

Section 901: “It shall be lawful for such corporation, whenever it may be necessary in the construction of its road to cross any road or stream of water, to divert the same from its present location or bed; but such corporation shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness.”

Section 2211, Code of Civil Procedure, as amended by Act of March 7, 1899 (Session Laws, 1899, p. 135): “Subject to the provisions of this Title, the right of eminent domain may be exercised in behalf of the following public uses * * * railroads * * * telegraph lines. * * *”

In order to reach a conclusion we have considered these provisions as all parts of one statute, and that, too, without regard to the division into sections and subsections. Resort to the authorities is of little assistance. We must determine what these statutes mean, and to that end we have arrived at what we believe was the legislative intent, so far as applicable to the question before us, and that intent is fairly stated by treating all the sections above as one statute, and paraphrasing it as follows:

Every railroad corporation has power:

1. To select the route which it deems most advantageous.
2. To receive donations of real estate in aid of the construction and maintenance of the road.
3. To purchase or receive by donation real estate necessary for the construction and maintenance of the road.
4. To secure such real estate as is necessary for sidetracks, for turnouts, for machine-shops, for offices, for depots, for stations, for the convenient buildings, fixtures, and machinery for its business, and for other adjuncts and appendages of like character.

5. To secure land, timber, stone, gravel, and other material to be used in the construction and maintenance of the road.

6. To build its road along, upon, or across any stream and to divert any stream from its present bed whenever in the construction of its road it is necessary to cross such stream.

These are the grants to the company. The limitations upon the powers granted and the exactions imposed upon the company are:

1. Its right of way shall be limited to two hundred feet in width, treating the right of way independently of the grant for cuts and embankments.

2. The amount of real estate which it may hold for any or all of the other objects or purposes named shall be limited to the necessities of the road.

3. The road shall be so constructed as to afford security to life and property.

4. Whenever a stream is interfered with, the company shall restore the same to its former state of usefulness, as near as may be, or so as not unnecessarily to impair its former usefulness.

When this company selected its route along and across the Musselshell river, it did not lie in the mouth of this petitioner to say that another route could have been chosen. (1 Current Law, 1009; 3 Current Law, 1193; *Dallas v. Hallock*, 44 Or. 246, 75 Pac. 204; 2 Lewis on Eminent Domain, 2d ed., 891.) The company had the right to select the particular route which it deemed most advantageous, and, having selected such a route with which the Musselshell river interfered, it has power to secure land necessary for its use in constructing and maintaining the road on such route in such manner as to afford security for life and property.

We think counsel for relator are in error in assuming that subdivision 4 of section 894 limits the power of the railway company to condemn land or other property for railroad purposes generally. The power is granted the railway company to secure land sufficient to construct and operate its road,

with all necessary sidetracks, turnouts, machine-shops, offices, depots, and such other adjuncts and appendages as are necessary, and two limitations only are placed upon this grant of power: 1. The right of way shall not exceed a strip of land two hundred feet in width, except where a greater width is required for excavations and embankments; and 2. The land for excavations, embankments, sidetracks, turnouts, shops, etc., shall not exceed in extent the amount necessary for such uses or purposes.

Whether the grant contained in subdivision 7 is the same as that in subdivision 3, or whether the grant in subdivision 3 refers to lands upon which the road and its appendages and adjuncts rest, while subdivision 7 refers to lands the very soil and substance of which are to be used in the construction of the road and its maintenance, need not be considered, for we are of the opinion that any land necessary for the construction and maintenance of the road and its adjuncts and appendages may be acquired under subdivision 3 by purchase or by voluntary grant or donation, or may be acquired by condemnation proceedings under section 526, and the only limitations upon the amount of the land thus to be acquired are those just stated above.

Now, when it is remembered that the railway company was authorized to select the particular route which it selected, and was authorized to construct its road along the Musselshell river and change the channel of that river when the same would otherwise be crossed by the railroad, in our opinion the changing of the channel, when necessary to make the road secure for life and property, is as much a part of the construction of the road itself within the meaning of this statute, as the boring of tunnels, the construction of bridges, the excavation of cuts or the making of fills or embankments where necessary. Any other construction leads to the absurdity that authority to change the channel of the river is conferred, but the power to make the change is withheld, and such a construction of a stat-

ute is never to be indulged unless absolutely necessary from the very language employed in the statute.

Having arrived at the conclusion that the changing of the channel of this river is, in contemplation of the statute, a part of the construction of the road itself, it follows, as a matter of course, from subdivision 7 of section 894, or section 526, when read with subdivision 3, above, that authority to secure land necessary to make such change is conferred, and such land may be secured by condemnation proceedings. While we have not found any authorities directly in point, the following illustrate to some extent the views we entertain: 1 Lewis on Eminent Domain, sec. 256; *In re New York etc. R. R. Co.*, 33 Hun, 148; *Bigelow v. Draper*, 6 N. Dak. 152, 69 N. W. 570; *State v. St. Paul etc. Ry. Co.*, 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3.

As there does not appear to us to have been any error committed by the district court or the judge thereof, the petition filed in this court does not state any facts upon which relief may be granted. The demurrer to the petition is sustained, and the proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

YELLOWSTONE PARK RAILROAD COMPANY, APPELLANT, v. BRIDGER COAL COMPANY ET AL., RESPONDENTS.

34 36	545 224
34 138	545 392

(No. 2,331.)

(Submitted November 12, 1906. Decided December 8, 1906.)

Eminent Domain—Condemnation Proceedings—Railroads—Appearance — Pleadings — Default — Presumptions — Counterclaims—Damages— Evidence—Instructions — Appeal — Excessive Verdicts—Review.

Eminent Domain—Condemnation Proceedings—Appearance of Defendant—Failure—Effect.

1. *Held*, that defendant in condemnation proceedings is required to appear, either by demurrer or answer; and if he fails so to do, he has no standing in court for any purpose and may not be heard in the subsequent proceedings, notwithstanding the provisions of section 2221 of the Code of Civil Procedure, that the commissioners appointed to assess the damages shall hear the allegations and evidence of all persons interested, this section having reference to cases where the parties defendant are not in default.

Same—Failure of Defendant to Plead—Effect—Duty of Court.

2. Failure of defendant in condemnation proceedings to appear, either by demurrer or answer, does not relieve the court of the duty of determining whether the use for which the property sought to be condemned is a public use, limiting the amount taken to the necessities of the case and ascertaining the damages as provided in sections 2220, 2221 and 2224 of the Code of Civil Procedure.

Same—Failure of Plaintiff to Take Default—Effect—Presumptions.

3. Where plaintiff railroad company in a condemnation proceeding failed to take default against defendants, who had not answered or demurred, but permitted the case to proceed as if pleadings had been filed and issues properly made, and found no fault with any of the proceedings until hearing in the district court, it will be presumed that issues were made and properly determined.

Same—Damages—Pleadings—Counterclaims—Statutes.

4. Title VII, Part III of the Code of Civil Procedure does not require, either expressly or by implication, the defendant in condemnation proceedings to set up his claims for damages, special or general, and section 691 of that Code will not permit their being pleaded by way of counterclaim; and, therefore, plaintiff railroad company cannot be heard to complain that, by defendant's failure to plead them, it had no notice of their character and amount and was deprived of an opportunity to controvert them.

Same—Measure of Damages—Elements of Value.

5. In determining the amount of damages which defendants in condemnation proceedings for a railroad right of way are entitled to recover—
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cover, the court must take into consideration every element of value which would enter into the transaction if the parties plaintiff and defendant were negotiating a voluntary sale—i. e., ascertain the market value of the land after the right of way is taken.

Same—Damages to Lands not Taken—Pleadings—Evidence.

6. In the absence of statutory provision making it incumbent upon defendants in condemnation proceedings, instituted by a railroad company for right of way purposes, to specially plead damages to portions of their lands not actually traversed by the road and not described in the petition, they were not required so to do, and evidence showing such damages was properly admissible.

Same—Lands in Compact Bodies—Damages to Those not Taken.

7. Where the lands over which a right of way was sought by a railroad company were all in a compact body, it was within the purview of the court's duty to ascertain what damages had accrued, not only to that portion described in the complaint, but also to the whole of the body, a part of which only is taken by the company.

Same—Lands not Taken—Damages not Special—Pleadings.

8. Damages accruing to portions of the land of defendant in condemnation proceedings, instituted by a railroad company to secure a right of way, not actually traversed by the road, are not special in the sense that they should be pleaded.

Same—Pleadings of Plaintiff—Estoppel.

9. A railroad company seeking to acquire a right of way, but failing in its petition to mention the land not taken or damages thereto, cannot be heard to say that the detriment to the part not described is special and must be pleaded before it can be shown in evidence.

Same—Evidence—Offers to Purchase—Hearsay.

10. Evidence offered by plaintiff railroad company in condemnation proceedings for the purpose of showing an increase in the value of land in a certain locality since the building of its road, that offers of purchase, indicating an enhancement in value, had been made for parcels of land in the vicinity of that sought to be condemned for a right of way, which offers arose out of negotiations between persons not parties to, or witnesses in, the proceedings, was not only hearsay and therefore properly excluded, but its value depended upon the determination of so many collateral issues that it could not be relied on with safety.

Appeal—Rulings in Appellant's Favor.

11. Appellant may not complain of a ruling in his favor.

Eminent Domain—Condemnation Proceedings—Damages and Benefits—Witnesses—Evidence—Harmless Error.

12. Where in proceedings to condemn a railroad right of way, the jury assessed the damages and benefits separately as required by statute, finding the items well within the extreme limits of the testimony adduced, the mere fact that certain witnesses were permitted to give their opinions as to damages sustained by defendants after deducting all benefits, and were not required to state the damages sustained and benefits derived by the building of the road separately, if error, was harmless, the witnesses having been questioned fully as to the basis of their opinions, and the jury not having been misled.

Same—Setoffs.

13. *Quære*: In an action in eminent domain to condemn land for a railroad right of way, may any increase in the market price of defendant's lands, by reason of the building of plaintiff's road, be set off against any damages accruing to portions not actually taken?

Appeal—Evidence—Admissibility—Objections.

14. Counsel of appellant may not complain in the supreme court of a ruling of the district court, with reference to the admission of evidence, on a ground the reverse of that assigned in the trial court.

Eminent Domain—Condemnation Proceedings—Instructions—Award of Commissioners—Evidence.

15. An instruction, given by the district court in a proceeding looking to the condemnation of land for a railroad right of way, that the jury in arriving at a verdict should not consider the award theretofore made by the commissioners appointed to assess the damages, but should confine themselves exclusively to the testimony of the witnesses examined at the hearing before them, was a correct statement of the law, where the award formerly made by the commissioners had not been introduced in evidence and where the only reference made to it had been during the cross-examination of two of the commissioners, as to the amounts fixed by them in their award, which agreed with those fixed by them at the trial.

Same—Verdict—Appeal—Review.

16. Where the evidence taken as a whole gave substantial support to the findings of the jury in favor of defendants in condemnation proceedings, their verdict will not be disturbed on appeal, although the statements of many of the witnesses were conflicting and unsatisfactory upon material points.

Same—Excessive Verdict—Review.

17. Where the question, whether the lands not actually taken by a railroad company for a right of way, but adjoining it, had increased in value, had been agitated in proceedings in condemnation, the opinions of witnesses conflicting sharply as to the effect the building of the road had had on values along the line of road, and had been fairly submitted to the jury, who found that there were no benefits, and where on motion for new trial their findings had been re-examined by the court and the motion denied, their verdict, though larger than the award made by the commissioners, but well within the highest estimate of any witness, will not be disturbed as being excessive.

Same—Findings of Jury—Excessive Verdict—Review.

18. Findings of the jury, in condemnation proceedings, with relation to the amount of damages sustained by defendants by the taking of a railroad right of way through their lands, complained of as excessive, will not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of the "just compensation" provided for by section 14, Article III of the Constitution.

Appeal from District Court, Carbon County; Frank Henry, Judge.

CONDEMNATION PROCEEDINGS by the Yellowstone Park Railroad Company against the Bridger Coal Company and others. From the judgment, and from an order denying a new trial to plaintiff, it appeals. Affirmed.

Mr. W. M. Johnston, for Appellant.

While the courts have held that no answer need be filed in order to enable defendant to offer evidence as to the value of the land taken, they have held that an answer is necessary, when defendant attempts to prove damages to lands not taken and particularly where he attempts to prove special damages. By special damages is ordinarily meant such damages as will not necessarily accrue to the part not taken; that is, such damages as are not open and apparent, damages which are not in contemplation when the action is filed. (*Fayetteville etc. Ry. Co. v. Hunt*, 51 Ark. 330, 11 S. W. 418; 15 Cyc. 860; *Moran v. Ross*, 79 Cal. 549, 21 Pac. 958; *Cincinnati etc. R. Co. v. McFarland*, 22 Ind. 459; *City of Alameda v. Cohen*, 133 Cal. 5, 65 Pac. 127; *Monterey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700; *San Diego etc. Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977.) Even where the defendant is not required to file an answer in order to recover the value of the land taken and ordinary damages to lands not taken but crossed by the railroad and described in the complaint, he is required to file an answer setting forth his claim for damages to any lands not crossed by the road but contiguous to his lands so crossed (*Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74; *Chicago etc. Ry. Co. v. Hopkins*, 90 Ill. 316; *Johnson v. Freeport etc. Ry. Co.*, 111 Ill. 413; *Mix v. Lafayette etc. Ry. Co.*, 67 Ill. 319; *Ball v. Keokuk etc. Ry. Co.*, 71 Iowa, 306, 32 N. W. 354.)

Article III, section 14, and Article XV, section 9 of our Constitution provide that just compensation shall be made for property taken, but does not mention how benefits and damages are to be assessed. Section 2221, Code of Civil Procedure, provides how this shall be done. California has a statutory provision exactly like subdivision 3 of section 2221, Code of Civil Procedure. It has been held in California that "If the land be benefited by the making of the improvements," such benefits must be deducted from damages to the part not taken. (*Moran v. Ross*, 79 Cal. 549, 21 Pac. 958; *San Francisco etc. R. Co. v. Caldwell*, 31 Cal. 368; *California Pac. R. R. Co. v. Armstrong*,

46 Cal. 85, 15 Cyc. 765-768, and cases cited; *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188, 59 L. R. A. 581, 67 Pac. 1040.)

While farmers are competent witnesses to testify as to value of lands in their neighborhood, they must base their testimony upon the selling or market price of lands and not upon any fictitious or speculative value. It must be fixed by what the lands would actually bring when the owner has reasonable time and opportunity to find a purchaser. (*Phillips v. Town of Scales Mound*, 195 Ill. 353, 63 N. E. 180; 2 *Lewis on Eminent Domain*, 1048; *Board v. Hendricks*, 77 Miss. 483, 27 South. 613; 1 *Greenleaf on Evidence*, 15th ed., 52, 86, note; *San Diego etc. Town Co. v. Neale*, *supra*; *Seattle M. R. Co. v. Roeder*, 30 Wash 244, 94 Am. St. Rep. 864, 70 Pac. 498.)

The damages awarded are clearly excessive, and the lands of defendants are beyond question benefited by the construction of plaintiff's road. "Juries have no right to disregard facts and follow their own caprices." The verdict is not only grossly unfair but given without reference to uncontradictory testimony. A new trial should have been granted. (*Grand Rapids etc. Ry. Co. v. Weiden*, 70 Mich. 390, 38 N. W. 294; *St. Louis etc. Ry. Co. v. Vaughan*, 71 Ark. 643, 72 S. W. 575; 1 *Spelling on New Trial*, secs. 236-238, 243; *White v. Beal etc. Grocer Co.*, 65 Ark. 278, 45 S. W. 1060; *Cleckley v. Beall*, 37 Ga. 607; *Wendel v. North*, 26 Wis. 379; *Ottomeyer v. Pritchett*, 178 Mo. 160, 77 S. W. 62; *Lawrence v. Wilson*, 86 App. Div. 472, 83 N. Y. Supp. 821; *Southern Ry. Co. v. Lollar*, 135 Ala. 375, 33 South. 32; *Western etc. Ry. Co. v. Hunt*, 116 Ga. 448, 42 S. E. 785.)

Mr. Sydney Fox, and Mr. W. F. Meyer, for Respondents.

Our statute does not provide for any pleadings other than the petition. Where the petition or complaint is sufficient and the question of damages the only question at issue, it is not necessary or proper that an answer should be filed. If, however, there is a dispute or denial of matter alleged in the petition, or some extrinsic fact which constitutes a bar to the proceed-

ings, objection may be made by plea, answer or demurrer to the petition. But in a case, such as the present, where there is no dispute as to the facts stated in the complaint, answer is not necessary. (2 Lewis on Eminent Domain, 390; *Smith v. Chicago etc. Ry. Co.*, 105 Ill. 511; *Denver etc. R. R. Co. v. Griffith*, 17 Colo. 598, 31 Pac. 171; *Seattle etc. R. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720; 15 Cyc. 860; *Sheldon v. Minneapolis etc. Ry. Co.*, 29 Minn. 318, 13 N. W. 134; 6 Am. & Eng. Ency. of Law, 611, and note; *Jefferson v. Hazeur*, 7 La. Ann. 182; *Ellsworth etc. Ry. Co. v. Maxwell*, 39 Kan. 651, 18 Pac. 819; *Bentonville R. R. Co. v. Strond*, 45 Ark. 278; *Johnson v. Freeport etc. Ry. Co.*, 111 Ill. 413.) In the case at bar the facts stated in the complaint were admitted by defendants. Where part of a tract or lot only is taken, a cross-petition is not necessary in order to obtain damages to the part not taken. (2 Lewis on Eminent Domain, sec. 360, and citations under notes 66 and 67; *Northern Pac. R. R. Co. v. Reynolds*, 50 Cal. 90; *San Jose v. Freyschlag*, 56 Cal. 8; *Kansas City etc. Ry. Co. v. Littler*, 70 Kan. 556, 79 Pac. 114.)

On the question of general or special benefits, see 2 Lewis on Eminent Domain, secs. 471, 471a; 15 Cyc. 770, sec. A, subd. E; *Kaufman v. Tacoma R. R. Co.*, 11 Wash. 632, 40 Pac. 137; *Seattle etc. R. R. Co. v. Roeder*, 30 Wash. 244, 94 Am. St. Rep. 864, 70 Pac. 502.

The question of the weight of evidence is for the jury, and having determined it, appellate courts will not disturb the finding unless it is not supported by the proof. (*St. Louis etc. R. R. Co. v. Terhune*, 50 Ill. 150, 99 Am. Dec. 504; *Inhabitants of Redfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *Donaldson v. Mississippi Co. etc.*, 18 Iowa, 280, 87 Am. Dec. 391; *Ophir etc. Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *State v. Yellowjacket etc. Co.*, 3 Nev. 38; *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456; *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467.) Appellate courts will not disturb verdict on ground of insufficiency of evidence when there is evidence tending to support it. (*Roper v. Clay*, 18 Mo. 383, 59 Am. Dec. 314; *Baker v.*

Clipper, 26 Tex. 629, 84 Am. Dec. 591; *Johnson v. Winona etc. R. R. Co.*, 11 Minn. 296, 83 Am. Dec. 83; *Keene v. Cannovan*, 21 Cal. 271, 82 Am. Dec. 738; *Graham v. State*, 7 Ind. 470, 65 Am. Dec. 745.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Proceeding under the statute (Code Civ. Proc., Part III, Title VII, secs. 2216 et seq.), to condemn lands owned by defendants by separate rights, for the use of plaintiff as a right of way. The lands are all used for agricultural and stock-raising purposes. Those owned by defendant Hanson and wife consist of one hundred and sixty acres in a square body. Two forty-acre subdivisions are cut in two diagonally by the line of road from northeast to southwest. The area taken covers three and fifty-eight hundredths acres. The defendant Kuecking has one hundred and fifty-one and one-half acres in a compact body nearly square. The right of way runs through it in the same direction, cutting diagonally three forty-acre subdivisions, taking an area of three and six-tenths acres. The defendants Clark own three hundred and five acres in one compact body. The right of way runs into this tract from the north near the middle of one forty-acre subdivision and passes through it on a curve to the southwest to a point near the line of the western tier of forties on the south line of this forty, and thence due south, cutting two other forty's from north to south, and takes an area of six and three hundred and forty-five thousandths acres. The defendants Dew and wife own one hundred and sixty acres in a parallelogram extending north and south. The right of way runs through them from northeast to southwest on a wide curve, cutting three of the forty-acre subdivisions and taking five and forty-seven hundredths acres. All of these lands lie adjoining in the order named, along Clark's Fork river in Carbon county. Considerable areas of all of them are cultivable and produce grain and alfalfa hay. On the Clark lands is an orchard of thirty acres. The line of road over most of the way

through them is upon areas usually cultivated. The Clarks are also engaged in sheep raising and use their place as a home ranch. The Hanson and Kuecking lands are almost all cultivated. All of the defendants have water rights, and the taking of the right of way disturbs in a greater or less measure the ditches of the respective owners, and will entail additional labor and expense in changing them as well as the secondary ditches and laterals.

All of the defendants appeared in obedience to the summons issued, except the Bridger Coal Company—as to which, because of an adjustment made by it with plaintiff before the hearing in the district court, the proceeding was dismissed—but filed no answers or other pleadings. The hearing was had and the order of condemnation was made as if issue had been joined by defendants. The commissioners appointed in pursuance of the statute to assess the damages (Code Civ. Proc., sec. 2220), did so after a hearing and examination of the lands, and made their report. The plaintiff, being dissatisfied with the award, appealed to the district court. (Code Civ. Proc., sec. 2224.) Thereafter, upon a trial, a jury returned a verdict awarding damages as follows: To defendants Hanson, for land taken, \$214.80, and incidental damages, \$725; to Kuecking, for land taken, \$216, incidental damages, \$725; to Clark and wife, for land taken, \$285.52, incidental damages, \$1,500; and to Dew and wife, for land taken, \$328.20, incidental damages, \$1,295. The jury found that there were no benefits to any of the lands. From the judgment entered upon the verdict and from an order denying a new trial, plaintiff has appealed.

1. At the beginning of the trial, the defendants having assumed the burden of proof, the plaintiff objected to the introduction of any evidence by them “for the reason that no answer, counterclaim or any kind of a claim in damages has been filed in this action.” The objection was overruled and plaintiff assigns error.

It is the rule in many of the states that the defendant in condemnation proceedings is not required to make formal ap-

pearance either by answer or otherwise. The complaint is treated as denied, and the hearing proceeds as if formal issue had been made. This is the rule in Minnesota, Illinois, North Carolina, Iowa, and Arkansas. (*Sheldon v. Minnesota etc. Ry. Co.*, 29 Minn. 318, 13 N. W. 134; *Smith v. Chicago etc. Ry. Co.*, 105 Ill. 511; *Carolina etc. R. R. Co. v. Love*, 81 N. C. 434; *Corbin v. Wisconsin etc. Ry. Co.*, 66 Iowa, 269, 23 N. W. 662; *Bentonville R. R. v. Stroud*, 45 Ark. 278.) It was formerly the rule in Colorado (*Denver etc. R. R. Co. v. Griffith*, 17 Colo. 598, 31 Pac. 171), but it seems that the rule has been changed by a later statute. (*Whitehead v. Denver*, 13 Colo. App. 134, 56 Pac. 913.)

The procedure in such cases is regulated by the statutes of the particular states, and decisions made under them are generally of little aid in the interpretation of our own statute. In such proceedings the court acquires jurisdiction of the subject matter and the parties by the filing of the complaint in conformity with the requirements of section 2217, and the issuance and service of summons as directed by section 2218. The latter section provides: "The clerk must issue a summons which must contain the names of the parties, a description of the lands proposed to be taken, a statement of the public use for which it is sought, and a notice to the defendants to appear before the court or judge, at a time and place therein specified, and show cause why the property described should not be condemned as prayed for in the complaint. Such summons must, in other particulars, be in form of a summons in a civil action, and must be served in like manner upon each defendant named therein at least ten days previous to the time designated in such notice, for the hearing, and no copy of the complaint need be served. But the failure to make such service upon a defendant does not affect the right to proceed against any or all other of the defendants, upon whom service of summons had been made."

Sections 2219 and 2231 provide:

"Sec. 2219. All persons named in the complaint, in occupation of, or claiming an interest in, any of the property described in the complaint, or in the damages, for the taking thereof, though not named, may appear, answer or demur, each in respect to his own property or interest."

"Sec. 2231. Except as otherwise provided in this Title, the provisions of Part II, of this Code, are applicable to and constitute the rules of practice in the proceedings mentioned in this Title."

While sections 2218 and 2219, *supra*, do not require, but permit, an answer to be filed, yet, since section 2231 declares that the provisions of Part II of the Code of Civil Procedure shall, except where otherwise provided, be applicable and constitute the rules of practice in the proceedings mentioned in this Title, it must follow that an appearance, either by demurrer or answer, must be made by the defendants in order to give them any standing in court for any purpose; for section 632, Part II, declares what the summons must contain, in addition to what is required by section 2218, *supra*. Among other things, it must contain a notice that, if the defendant fails to appear or answer, judgment will be taken against him by default for the relief demanded in the complaint. Section 1020 declares that judgment may be had if the defendant fails to answer: (1) In actions arising on a contract, by the clerk upon entry of default; (2) upon a hearing, by the court after the entry of default by the clerk; and (3) in a case where service of summons has been had by publication, upon a hearing by the court after proof of the required publication. Construing these provisions together, it is apparent that the defendant is required to appear and make his defense as in ordinary actions. And, if he fails to appear and save default by one of the modes provided, he has no right to be heard in the subsequent proceedings. This is so notwithstanding the provision of section 2221, which requires the commissioners appointed to assess the damages, to hear the allegations and evidence of all persons interested.

The latter provision evidently contemplates cases where the parties defendant are not in default, for, if they must, notwithstanding their default, be heard by the commissioners, they may appeal (section 2224) and still have a jury trial as to the amount of damages—a situation which, in view of the provisions applicable to ordinary actions, would be absurd.

But this conclusion does not involve the idea that the court is not bound to proceed in conformity with the other requirements of this Title in the performance of its duties. The only effect of a default is to shut out the defendants from participating in the proceedings. The court must, nevertheless, determine whether the use for which the property is sought to be appropriated is a public use, limit the amount taken to the necessities of the case, and ascertain the damages under the procedure and in accordance with the standard provided therefor in sections 2220, 2221, and 2224.

But, while this is true, the plaintiff in this case may not now be heard to say that he has been prejudiced by the ruling complained of. It failed to take default against the defendants. They were permitted to appear at the hearing when the order of condemnation was made, plaintiff's counsel thinking, doubtless, that they were not required to file any pleading. No fault was found with any of the proceedings until the opening of the trial on appeal. Upon inspection of section 2217, *supra*, it will be seen what issues may be made and tried upon the pleadings. The case having proceeded to the making of the order of condemnation without objection, as if issues had properly been made, it must be presumed that they were made, and, since there is no complaint of any error in regard to them, it must be presumed that they were properly determined.

But counsel says that the defendants' claims for damages should have been set up in their answers by way of counterclaim, thus giving plaintiff notice of their character and amount, so that it could be prepared to meet them. The answer to this contention is that there is no provision in the Title touching condemnation proceedings, requiring defendants to set up their

claims for damages in their pleadings in any form. And when we examine the provisions of Part II relating to the forms of pleadings and declaring what may be set up as counterclaims, we find that they clearly exclude damages awarded in such cases. The counterclaim permitted by section 691 must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of a designated class of causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant or of one or more defendants between whom and plaintiff a separate judgment may be had in the action. It must also be matured and exist at the time the action is brought.

When this proceeding was commenced, the defendants had no cause of action against the plaintiff, and a recovery of the damages to which they are entitled tends in no way to defeat plaintiff's right to have the land condemned for a roadbed, whatever may be the amount of recovery. Indeed, the purpose of the whole proceeding is to enforce the sale of a portion of defendants' lands to plaintiff, to ascertain the damages—the purchase price—and to compel payment of them. And, since the statute does not require, either expressly or by implication, that the defendants must plead their damages or present any other issues than those which go to the truth of the petition itself, they may not be required to do so, no matter whether the damages are general or special, and, in determining the amount which they are entitled to recover, the court is bound to take into consideration every element of value which would be taken into consideration if the plaintiff were negotiating a sale with the defendants as a willing purchaser and the defendants were willing sellers. (*Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Webster v. Kansas City etc. Ry. Co.*, 116 Mo. 114, 22 S. W. 474; *Denver etc. R. R. Co. v. Griffith*, *supra*.) In other words, it must ascertain the market value of the lands after the right of way is taken.

2. Objection was made to certain evidence tending to show damage to portions of defendants' lands not actually traversed

by the railroad and not described in the petition. It is said now that the claims for damages in this behalf should have been specially pleaded, and plaintiff cites several Illinois cases in support of his contention; among them, *Stetson v. Chicago etc. R. Co.*, 75 Ill. 74; *Chicago etc. R. Co. v. Hopkins*, 90 Ill. 316; *Johnson v. Freeport etc. Ry. Co.*, 111 Ill. 413. It will be seen on examination of these cases, however, that the Illinois statute permits the defendant in such cases to file a cross-petition in order to set forth more fully and accurately his claim. But our statute contains no such provision. Besides, as we have seen, the lands of the different defendants in this case are all compact bodies, and it is clearly within the purview of the court's duty to ascertain what damages have accrued, not only as to the part described in the complaint, but also to the whole of the body, a part of which only is taken. Such damages are not special in the proper meaning of that term. (*North Pac. R. Co. v. Reynolds*, 50 Cal. 90; *Sheldon v. Minnesota etc. R. Co.*, *supra*; *Sherwood v. St. Paul etc. R. Co.*, 21 Minn. 122; *Fayetteville etc. Ry. Co. v. Hunt*, 51 Ark. 330, 11 S. W. 418.) The plaintiff should not, after describing only so much of the entire tract as suits its convenience, be heard to say that the detriment to the part not described is special and must be pleaded by the defendants in order to make it incumbent upon the commissioners or the court to consider defendants' claims.

3. The plaintiff, for the purpose of showing that all the lands along Clark's Fork river had been enhanced in value by the building of the road, tendered evidence to prove that offers had been made by various persons to the owners of selected parcels of land in the vicinity of the lands of defendants of one hundred dollars per acre. All these offers but one, which will be hereafter noticed, arose out of negotiations between persons none of whom are parties to this proceeding or were witnesses on the trial. The evidence having been excluded, counsel for plaintiff insists that the ruling was erroneous. There is no merit in this contention. The offer was an attempt to get

before the jury hearsay declarations of third parties as to value not supported by oath, without the right of cross-examination by the defendants. The right mode of proving value is to take the sworn opinions of those who are shown to be competent to give opinions on the subject, and let them be cross-examined as to the foundation of their opinions, their means of knowledge and the motives prompting them. Furthermore, the value of such evidence depends upon the determination of so many collateral issues that it cannot be relied on with safety. With reference to it the supreme court of New York has well said:

"Its value depends upon too many circumstances. If evidence of offers is to be received it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article and of sufficient ability to pay; also whether the offer was cash, for credit, in exchange, and whether made with reference to the market value of the article, or to supply a particular need or to gratify a fancy. Private offers can be multiplied to any extent for the purposes of a cause, and the bad faith in which they were made would be difficult to prove. The reception of evidence of private offers to sell or purchase stands upon an entirely different footing from evidence of actual sales between individuals or by public auction, and also upon a different footing from bids made at auction sales. (*Young v. Atwood*, 5 Hun, 234.) The reception of this class of evidence would multiply the issues upon questions of damages to an extent not to be tolerated by courts aiming to practically administer justice between litigants." (*Keller v. Paine*, 34 Hun, 177.)

In *Hine v. Manhattan Ry. Co.*, 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591, the inquiry was: What was the market value of the premises in controversy prior to the building of the defendant's railroad? On the trial in the lower court evidence of offers made to the owner had been received. The appellate court held this error, on the ground that it was objectionable as hearsay, and on the further ground stated by the supreme court in *Keller v. Paine*, *supra*. On both the grounds we think the

evidence was properly excluded. The rule stated in these cases has been followed quite generally by the courts, whether the particular offer was made to third persons for other lands in the vicinity or to a party for the lands in question, either by third persons or the condemning party. (*Chicago etc. R. Co. v. Muller*, 45 Kan. 85, 25 Pac. 210; *Winnisimmet Co. v. Grueby*, 111 Mass. 543; *Davis v. Charles River Branch R. Co.*, 11 Cush. (Mass.) 506; *Selma etc. Ry. Co. v. Keith*, 53 Ga. 178; *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594; *Lehmicke v. St. Paul etc. R. Co.*, 19 Minn. 464 (Gil. 406); *Concord R. Co. v. Greely*, 23 N. H. 237; *Watson v. Milwaukee etc. Ry. Co.*, 57 Wis. 332, 15 N. W. 468; 2 Lewis on Eminent Domain, 446.)

The other offer referred to above was made to defendant Clark himself of forty dollars per acre of all the land owned by himself and wife, which Clark signified his willingness to accept. This evidence was admitted without objection. Under the circumstances plaintiff cannot complain, for, whether right or wrong, the ruling of the court was in its favor.

4. In assignments 8, 10, 11, 12, 13, and 14 error is alleged in that the court permitted different witnesses to give their opinions as to the damage sustained by the defendants to lands not taken, after deducting all benefits. The argument is that, since the statute (Code Civ. Proc., secs. 2221, 2224) requires the commissioners in the first instance to assess the damages and benefits separately, the witnesses should have been required to state the damages and benefits separately, and, since this was not done, the evidence confused rather than aided the jury.

There is much conflict in the decisions of the courts as to whether a witness should be allowed to state his opinion as to the amount of damages or benefits accruing to the defendant in condemnation proceedings. The cases are collected in the footnotes to section 476 of Mr. Lewis' work on Eminent Domain. The conflict of opinion, however, seems more apparent than real, for in all the states the opinions of witnesses must be resorted to to determine (1) the value of the land taken; (2) the detriment, if any, to the portion not taken, or, in other words, the value of

that not taken; and (3) the benefits, if any, to the portion not taken. If the witnesses state the items separately, it requires only an arithmetical calculation to reach a determination of the net result. Does it really matter whether this is done by the witnesses or by the jury? When the witness has stated the facts upon which his opinion is based—thus furnishing the jury the means of judging of its trustworthiness—the mental process necessary to arrive at the net result may as well be that of the witness as of the jury. In effect, the expression of opinion as to the items of value is an expression of opinion as to the net result.

After commenting on the diversity of opinion on this subject, Mr. Lewis says: "The law is supposed to discourage all indirect and circuitous methods. Why a witness should not be allowed to state at once and directly his opinion of the amount of damages or benefits in answer to a single question, instead of stating it indirectly in answer to two questions, we are unable to perceive. The distinction attempted to be maintained between the two methods is without any substantial difference and must eventually be abandoned." (2 Lewis on Eminent Domain, sec. 436.)

In this case the witnesses were questioned fully as to the bases of their opinions. The jury, under the instructions of the court, assessed the damages as required by the statute, finding the items well within the extreme limits of the testimony. Even if, therefore, it be conceded that the questions were not technically correct in form, we do not see how any prejudice was suffered.

5. On redirect examination the following question was asked one of the defendants' witnesses: "I will ask you if Mr. Dew's land has increased in value to any greater extent than any other lands of similar character and quality of his in the Clark's Fork valley since the building of the railroad?" An objection that this was immaterial testimony and was not proper re-examination was overruled, whereupon the witness answered that it had not. While this ruling is assigned as error, the argument in the brief is devoted to the question whether or not an increase in the market price of defendants' lands, generally or specially, by

reason of the building of the road should not be set off against any damages accruing to the portion not taken, counsel arguing that the setoff should be allowed. Whether the question presented by counsel should be resolved in favor of plaintiff we need not now decide. If the setoff should be allowed, the evidence was material, for, if the plaintiff had a right to a setoff on account of the alleged enhancement of value, the defendants had the right to show that there was none. The argument of counsel tends to support the view that it was material. Evidently the court thought that it was, for the instructions submitted to the jury were formulated on the theory that credit should be allowed for such benefits. In any event, counsel has assumed a position in this court which does not entitle him to complain, because it is exactly the reverse of the position which he assumed in the district court.

6. Complaint is made that the instructions were not sufficiently specific in laying down the rule to be pursued by the jury in assessing the damages. Considering the charge as a whole, it was as fair as the plaintiff could ask. That the jury were not misled is clear from the fact that they followed the rule laid down in the statute, finding separately upon the different items of damages and benefits as is therein prescribed. While paragraph 21, of which particular mention is made, might have been stated with more clearness, it follows the statute in substance and is correct.

Criticism is made of paragraph 24 of the charge, because the court therein told the jury that they must not consider the award theretofore made by the commissioners, but should confine themselves exclusively to the testimony of the witnesses examined at the hearing. This was clearly correct for the reason that the award was not introduced in evidence. The only reference to it was made during the cross-examination of two of the commissioners who were sworn as witnesses at the trial. Being asked as to the amounts fixed by them in their award, they stated amounts which agreed with those fixed by them at the trial. The trial was *de novo* as to the damages. The award of the com-

missioners could not be competent for any purpose, except to impeach the statements of those commissioners who were sworn as witnesses, in case their opinions expressed at the trial differed from their findings. The caution contained in this paragraph was perhaps not necessary, but it is not erroneous.

7. It is said that the evidence is not sufficient to sustain the verdict. It would be a bootless task to take up and analyze the evidence and undertake to reconcile the statements of the various witnesses. Most of them were practical farmers and business men who knew the lands in controversy, and, while their statements are conflicting and unsatisfactory upon material points, we cannot say that the evidence all together does not give substantial support to the findings of the jury. That this court must, under these circumstances, accept them as final is too well settled to permit further discussion.

8. Finally, it is said that the award of the jury for damages to the lands not taken is excessive, as is apparent from the fact that the evidence conclusively shows that the lands of all the defendants have been increased in value by the building of the road, because it not only furnishes easier access to market, but also, for the same reason, it makes them available for other products for which until the road was built there was no market. This matter was agitated at the trial, and there was a sharp conflict in the opinions of the witnesses as to what effect upon the value of the lands along the line of road and in the community generally the building of the road has had. The question was fairly submitted to the jury. They found that there were no benefits. Their findings were re-examined by the court upon the motion for a new trial. While the verdict is, in case of each defendant, for a larger sum than the amount awarded by the commissioners, the jury might have found a larger amount and still kept well below the highest estimate of any witness. The fact that they found that there were no benefits, though some of the witnesses were of a contrary opinion, does not of itself conclusively show that they were controlled by sentiments of passion and prejudice. It merely shows that they regarded the

opinions of the defendant's witnesses as more trustworthy than those of plaintiff.

It may be conceded that the building of the road has improved market facilities for all the defendants. Yet this does not necessarily compel the conclusion that the market value of their lands has been appreciably enhanced, even though it should be accepted as the correct doctrine that such enhancement of value may be offset against the damages. The real inquiry is "whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all the circumstances of the case, and it will be so presumed, unless the verdict is so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them." (13 Cyc. 122.)

Upon the evidence before us we cannot say that the findings of the jury in the particulars referred to are so obviously and palpably out of proportion to the injury done the defendants as to be in excess of what is meant by the expression "just compensation" as used in the Constitution.

The plaintiff has, we think, had a fair trial and the judgment and order must be affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

34	564
36	108

LINDSLEY, RESPONDENT, v. MCGRATH, APPELLANT.

(No. 2,301.)

(Submitted October 11, 1906. Decided December 11, 1906.)

Claim and Delivery—Instructions—Assumption of Facts—Mortgages—Transfer—Evidence—Harmless Error—Principal and Agent—Power of Attorney.

Claim and Delivery—Instructions—Assumption of Facts—Mortgages—Transfer—Notice.

1. Instructions requested by defendants in an action in claim and delivery, that unless one of the defendants, as assignee of a chattel mortgage, had notice or knowledge of a prior mortgage to plaintiff's assignor, the verdict should be for defendants, and that the burden of proof is on the plaintiff to establish the fact that such defendant had notice of the prior mortgage, contained an assumption that the defendant had paid value therefor, a fact directly in issue, and were properly refused by the court.

Same—Evidence—Appeal—Harmless Error.

2. Where, in an action in claim and delivery, the mortgagor of the chattels in controversy, called to testify in behalf of plaintiff, on her examination in chief was asked whether she had not made a statement that a mortgage had been made by her on the property, but that it would be released by the mortgagees at any time she asked them to do so, and she answered in the negative, any error committed in permitting the question to be answered, if error, was harmless.

Same—Principal and Agent—Power of Attorney—When Authority Conferred may not be Questioned.

3. Where one, claiming to act for another, had taken possession of personal property under a mortgage held by his principal, and, under a writing giving him power to do any and all things necessary in the premises, but which failed to state what the premises were, had transferred for value the mortgage and a note secured by it, one of the defendants in an action in claim and delivery, who claimed no interest whatever in the chattels in controversy but had acted as agent of his codefendant in the taking of them, could not complain that the attorney in fact of the original holder of the mortgage had acted without or in excess of his authority under his power, or that the writing was void for uncertainty.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Ida Lindsley against John McGrath and another. From a judgment in favor of plaintiff, and from an order denying him a new trial, defendant McGrath appeals. Affirmed.

Messrs. Maury & Hogevoll, for Appellant.

Mr. C. M. Parr, for Respondent.

MR. JUSTICE HOLLOWAY, delivered the opinion of the court.

This is an action in claim and delivery brought by Ida Lindsley against John McGrath and John Doe, whose true name was to plaintiff unknown at the time of the commencement of the action.

The plaintiff claims to be the owner and entitled to the possession of certain personal property, consisting of household goods in a rooming-house in Butte. She alleges that the defendants wrongfully took possession of the property and retained the same, and that its value is \$2,750, and she claims to have been damaged in the sum of \$500 by reason of its wrongful detention. She alleges that before the commencement of the action she made demand upon defendants for the return of the property, but this demand was refused. Defendant McGrath and one William Case made a joint answer, in which they say that Case is the person sued as John Doe. They deny the ownership or right of possession of plaintiff to the property; admit that it is worth \$2,750; and admit that they took possession of it without the consent of the plaintiff, and retained such possession until the property was taken from them by the sheriff in this action. They deny that the taking or detention was wrongful, and deny that any demand was made upon them. They deny that plaintiff was damaged in any sum whatever.

Defendants then set forth that on June 2, 1905, Anna Gardner was the owner, in possession, and entitled to the possession of this property; that she then and there made, executed and delivered to one Nannie Lemmon a certain promissory note for \$1,000 due one year after date, bearing interest at one per cent per month, interest payable monthly, and, to secure the payment of said sum, then and there executed and delivered to the said

Nannie Lemmon a certain chattel mortgage on the property now in controversy; that upon the same day the defendant Case, for a valuable consideration, bought from Nannie Lemmon said note and mortgage; that thereafter, on June 8, 1905, he deemed his security unsafe for the reason that Anna Gardner had given possession of the property to Rodgers & Davenport, and so deeming his security unsafe, Case, acting through his agent, McGrath, took possession of the property and continued to hold the same until this action was commenced.

The reply admits the execution and delivery of the note and mortgage by Gardner to Lemmon, but denies that there was any consideration whatever for either; alleges that they were made to hinder and defraud this plaintiff; and also charges that there was a conspiracy entered into between Gardner, Case, and the attorneys for Lemmon to defraud this plaintiff out of her property. The reply further denies that there was any consideration for the transfer of the note and mortgage, or either of them, from Lemmon to Case.

Upon the trial the plaintiff undertook to prove her right to the possession of the property by showing that on February 3, 1905, Anna Gardner, who was then the owner and in possession of the property, had executed and delivered to one Ada Stadler certain notes aggregating \$2,750, and, to secure the payment of the same, had executed and delivered a chattel mortgage upon the property in controversy; that thereafter, for a valuable consideration, Ada Stadler, acting through J. R. Davenport, who claimed to be her agent appointed by a power of attorney, had assigned the note and mortgage to the plaintiff after he had taken possession of the property under the mortgage. The power of attorney is as follows: "Know all men by these presents that we, J. J. Stadler and Ada Stadler, of the county of Meade, state of Kansas, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, J. R. Davenport, of Silver Bow county, Montana, our true and lawful attorney, for us and in our names, places, and stead, giving and granting unto our said attorney full power and authority to do

and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents or purposes, as we might or could do if personally present, hereby ratifying and confirming all that our said attorney, J. R. Davenport, shall lawfully do or cause to be done by virtue of these presents. In witness whereof," etc.

Upon the trial the witness Gardner was asked by counsel for plaintiff if she had not told plaintiff on the evening of June 2d that she had that day given a mortgage to Maury & Hoge-voll, but that they would release it any time she asked them, and if she did not state that she would then go to Maury & Hoge-voll's office and have them undo what she had done that day, and that she left and soon afterward returned, saying she could not do it, that they, meaning Maury & Hoge-voll, refused to do it. This was objected to, but the objection was overruled, and the witness answered that she had not made any such statement to the plaintiff. At the close of the testimony counsel for defendants moved the court to direct a verdict in their favor upon five grounds; but, as only one is argued in appellant's brief, it will be unnecessary to state the others. The ground of the motion argued is that the evidence fails to show any authority from Ada Stadler to J. R. Davenport to transfer the note and mortgage, or either of them, to the plaintiff. This motion was overruled.

The defendants requested the court to give instructions numbered 2 and 5, as follows: "No. 2. Unless you find that William Case had notice or knowledge of some prior mortgage to Ada Stadler, your verdict should be for defendants." "No. 5. The court instructs the jury that in this case there is no evidence showing, or tending to show, that William Case had any knowledge or notice of any chattel mortgage from Anna Gardner to Ada Stadler, and that the burden of proof is on the plaintiff to establish the fact that William Case had notice or knowledge of some other mortgage. The fact that the prior mortgage had been recorded would not be notice to

Case, as it was not entitled to record." The request was refused.

The jury returned a verdict in favor of the plaintiff, and judgment was entered thereon adjudging plaintiff to be the owner and entitled to the possession of the property, and that she recover her costs. From this judgment and an order denying his motion for a new trial, the defendant McGrath appeals.

The appellant makes the following assignments of error: (1) Error in the refusal of the court to give defendants' requested instructions 2 and 5 above; (2) error in the admission of evidence; and (3) error in the refusal of the court to direct a verdict in favor of the defendants.

1. In each of the requested instructions above there is an assumption of fact which was directly in dispute, viz., that Case had paid value for the Lemmon note and mortgage. This must be so; for, if he did not pay anything for them, the rule announced would not have any application to him. It is only applicable upon the assumption that he had in fact paid value for them; and whether in fact he had done so was an issue directly before the jury for determination, and any assumption by the court of such a fact would have been error. (*Gallick v. Bordeaux*, 31 Mont. 328, 78 Pac. 583, and cases cited.) For the reason stated, each of the instructions was properly refused.

2. Counsel assign as error the ruling of the court in permitting the witness Gardner to answer the question stated above, as to whether she had not made a certain statement to Mrs. Lindsley on the evening of June 2d; but in their brief they argue an entirely different matter. They say: "The court erred in allowing evidence of Mrs. Gardner to be introduced to the effect that she, after the alleged conspiracy was completed, had made a statement to the fact that the mortgage to Lemmon was not made in good faith." But counsel are mistaken as to the contents of the record. The record shows that Mrs. Gardner denied absolutely that she made any such statement; and therefore the error, if any, in asking the question was harmless. The plaintiff introduced the testimony of Mrs. Lindsley to the effect

that Mrs. Gardner had made the statement above. But this testimony went in without objection, so far as this record discloses.

3. In order to make out her case, plaintiff called J. R. Davenport to show by what authority he transferred to her the Stadler note and mortgage. Davenport assumed to act for Mrs. Stadler under the power of attorney, the terms of which are set out above. Appellant contends that the instrument is void for uncertainty—that Davenport is not thereby authorized to do any particular thing or act for Mrs. Stadler generally. While it must be admitted that the instrument is very uncertain in its terms, we are not prepared to say that it is void. It was not necessary that the authority exercised by Davenport be conferred in writing (Civ. Code, sec. 3085); and it is an elementary rule of the law of agency that in a case of this character no particular form of words is necessary to convey the authority or define the agent's powers. (5 Current Law, 65.) Furthermore, in determining the meaning of this instrument, the validity of which is called in question by a third person, McGrath, who does not claim to have any interest in the property whatever, but acted only as agent for Case, who has not appealed and therefore does not complain of the judgment, it should be liberally construed in favor of Mrs. Lindsley, who claims that she has parted with value upon the assumption that Davenport had the authority to do what he assumed to do while in possession of the property. By express terms in the writing Davenport is made the agent for Mrs. Stadler. The scope of his authority is not defined accurately; but so long as his principal, Mrs. Stadler, is not complaining that he has exceeded the authority intended to be granted, this appellant cannot make that complaint for her. That being true, and Davenport having had possession of the property at the time of the transfer, and Mrs. Lindsley having parted with value upon the assumption that Davenport had the authority to transfer the note and mortgage, we shall not stop to inquire the precise effect of the writing so far as it relates to the scope of the agent's authority, but content ourselves

with saying that Davenport was the agent of Stadler, and, as such, transferred the note and mortgage; and, in the absence of any complaint from the principal, we hold that the agent had authority to do what he purported to do. (1 Clark & Skyles on Agency, sec. 236.) Further than this it is not necessary to go.

We have considered the assignments of error argued by appellant in his brief, but think he fails to show that any reversible error was committed.

The judgment and order are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

34 570
138 471

STATE, APPELLANT, v. LIVINGSTON CONCRETE BUILD-
ING AND MANUFACTURING COMPANY, RESPONDENT.

(No. 2,353.)

(Submitted November 14, 1906. Decided December 13, 1906.)

*“Eight-hour Law”—Constitution—Statutory Construction—
Master and Servant—Freedom of Contract—Equal Protec-
tion of the Laws.*

Penal Statutes—Indefiniteness—Construction—Legislative Intent.

1. A statute, though penal in character, will not be held invalid because of the indefinite language in which it is couched, if the purpose or intent which the legislature had in mind in enacting it can be ascertained.

Statutes—Eight-hour Law—Intent of Legislature.

2. By Chapter 50 of the Laws of 1905, providing that eight hours shall constitute a day's labor on all public works, in mills and smelters for the treatment of ores and in underground mines, it is not intended to impose punishment upon laborers in any of the designated employments who do not work for a full period of eight hours in every working day, but its object is to prevent them from working continuously for a term longer than eight hours.

Same—Eight-hour Law—Inhibition Applicable to Employer and Employee.

3. Chapter 50, page 105, of the Laws of 1905, making eight hours a day's work on certain employments, and providing that “every per-

son, corporation, stock company or association of persons" violating the statute shall be guilty of a misdemeanor, is not open to the objection that it cannot be determined therefrom whether it is intended to punish the employer, employee or both for an infraction of its provisions; it includes within its inhibition both employer and employee, and the former may be punished for causing his employee to work for a longer period, and the latter for working continuously for a term exceeding eight hours.

Same—Eight-hour Law—Arbitrary Legislation.

4. The purpose of the legislation contained in Chapter 50, page 105 of the Laws of 1905, being to conserve the health and promote the happiness of workmen engaged on public works, in underground mines, and in mills and smelters for the reduction of ores, the criticism that it is harsh and arbitrary in that it prevents the employee from working more than eight hours, even if working by the hour, is not meritorious.

Same—Eight-hour Law—Emergency Cases—Review of Legislative Policy.

5. The fact that the legislature, in enacting Chapter 50, page 105, Laws of 1905, known as the "eight-hour law," did not make provision for cases of emergency where life or property is in danger, is not a valid objection to it, this consideration being one of legislative policy, which courts will not review except where it appears that in its operation the Act in question would be so unreasonable that it could not be supposed that the legislature intended it to have the effect which would be brought about by its enforcement.

Eight-hour Law—May Servant Prolong Labor in Emergency Cases?

6. *Quære*: May an employee prolong his labor beyond the eight-hour period prescribed by Chapter 50, page 105, Laws of 1905, where a sudden emergency arises whereby life or property is placed in imminent danger, without violating the spirit of the statute?

Statutory Construction—Eight-hour Law—Constitutional Amendments—Regularity of Adoption—Review.

7. In construing Chapter 50, page 105, Laws of 1905, enacting the "eight-hour law," the question whether the amendment to the state Constitution relative to the subject, adopted by popular vote at the election of 1904, had been properly submitted, is immaterial, since the validity of the statute must be determined with reference to the Fourteenth Amendment to the federal Constitution, irrespective of whether or not the amendment to the state Constitution authorizes its enactment.

Eight-hour Law—Right to Perform Labor for State—Freedom to Contract.

8. One who contracted with a city to lay a concrete sidewalk, and who was informed against and convicted for a violation of the provisions of Chapter 50, page 105, of the Laws of 1905, prescribing that eight hours should constitute a day's labor on all public works, cannot complain that the statute abridges his freedom to contract, since no one is entitled, as a matter of absolute right, to perform labor for the state or any of its subdivisions, and it is within the power of the state to prescribe under what conditions work may be performed for it or its municipalities.

Same—Constitution—Equal Protection of Laws.

9. The "eight-hour law" (Chapter 50, Laws of 1905, page 105) is not obnoxious to the constitutional provision, guaranteeing to all the equal protection of the laws, because the rule of conduct therein prescribed applies alike to all who contract to do work for the state or any of its subdivisions, and alike to all employed to perform labor on such work.

Same—Public Works—Governmental Control.

10. One convicted of a violation of the provisions of Chapter 50, Laws of 1905, page 105, for causing his employees to work for more than eight hours a day laying a concrete sidewalk for a city, may not complain that daily labor at such employment for a period longer than eight hours was not injurious to the laborer, since the state, through its municipal agent—the city—had full control of the work and could prescribe such conditions relative to the manner in which it should be done as it saw fit to impose; and this is not the exercise of police power, but the exercise of governmental control over the state's own work.

Same—Mines—Smelters and Mills—Police Power—Constitution.

11. Held that the provisions of Chapter 50, Laws of 1905, page 105, limiting the hours of labor of employees in underground mines and in mills and smelters for the reduction of ores to eight hours a day, constitute a valid exercise of the police power of the state and are not obnoxious to constitutional provisions.

Eight-hour Law—Private Contracts—State may not Interfere.

12. The right of persons engaged in private business to enter into contracts for labor with relation to such business is protected by the Fourteenth Amendment to the federal Constitution, and the state may not interfere.

Appeal from District Court, Park County; Frank Henry, Judge.

THE LIVINGSTON CONCRETE BUILDING AND MANUFACTURING COMPANY was charged with violating the provisions of the eight-hour law. From a judgment sustaining defendant's demurrer to the information, the state appeals. Reversed and remanded.

Mr. Dan Yancey, for Respondent.

The provision of the statute in question, relative to work carried on by contractors for municipalities, is in direct conflict with the Fourteenth Amendment to the Constitution of the United States, which prohibits any state from depriving a person of liberty or property without due process of law, as well as in conflict with our own Constitution. The right to purchase or sell labor is part of the liberty protected by said amendment. (*Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226, 24 Pac. 737, 9 L. R. A. 483; *Seattle v. Smyth et al.*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120.) The privilege of contracting is also a property right intended to be protected by the United

States Constitution. (*Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 82.)

It is an essential incident to the acquisition of property, and is such right as the legislature may not arbitrarily and without sufficient cause either abridge or take away. The number of hours' labor that shall be performed is an important factor, and constitutes an essential part of every contract of service and to deny the contracting parties the right to fix the hours is beyond the power of the legislature. (*Cleveland v. Clements Bros. etc. Co.*, 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885, 59 L. R. A. 775; *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, 52 L. R. A. 814.)

All the late decisions hold contrary to the doctrine that the statute is a mere direction by the sovereign authority to one of its own agencies (the city) to contract in a particular way. The construction of sidewalks is a purely local affair with which the state legislature has no concern. (*Cleveland v. Clements Bros. etc. Co.*, *supra*; *People v. Coler*, *supra*.)

Neither the police power nor the Constitution of the United States or of this state will sanction any part or parcel of this Act. It is of that class of legislation called paternal, and a vicious attempt to put the laboring man under insulting tutelage and at the same time prevent his employer from exercising his liberty and property rights. (*In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, 47 L. R. A. 52; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937; Tiedeman on Limitations of Police Power, secs. 86, 178; Cooley's Constitutional Limitations, 5th ed., p. 486; *People v. Coler*, 168 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, 52 L. R. A. 814; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79.)

The states of California, Colorado and Washington have each decided adversely to the constitutionality of such statutes. (*Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226, 24 Pac. 737, 9 L. R. A. 483; *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep.

269, 58 Pac. 1071, 47 L. R. A. 52; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120.)

Mr. Albert J. Galen, Attorney General, *Mr. E. M. Hall*, Assistant Attorney General, and *Mr. T. J. Walsh*, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Livingston Concrete Building and Manufacturing Company, a domestic corporation, was charged, by an information filed in the district court of Park county, with violating the provisions of Chapter 50, page 105, Laws of 1905, known as the "Eight-hour Law," in this: That the defendant, having a contract with the city of Livingston for the construction of certain cement sidewalks, crosswalks, and curbs, did unlawfully and willfully cause, suffer, and permit its servants and employees engaged in such work to work for a longer period than eight hours in a day. To this information the defendant interposed a general demurrer, which was sustained. The state appeals from the judgment for the defendant on the demurrer to the information.

The information states facts sufficient to constitute a public offense, if Chapter 50 above is a valid legislative enactment capable of being enforced; but on behalf of respondent it is urged (1) that the Act is so indefinite as to be incapable of enforcement, and (2) that, even if sufficiently definite, the Act is unconstitutional and void.

The provisions of Chapter 50, above, are as follows:

"Section 1. A period of eight (8) hours shall constitute a day's work on all works or undertakings carried on or aided by any municipal, county or state government, and on all contracts let by them, and in mills and smelters for the treatment of ores, and in underground mines.

"Sec. 2. Every person, corporation, stock company or association of persons who violate any of the provisions of section one (1) of this Act shall be guilty of a misdemeanor, and upon

conviction thereof shall be punished by fine of not less than one hundred dollars (\$100) nor more than five hundred (\$500) dollars or by imprisonment in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment."

1. It is said that the statute is too indefinite to be enforceable, in that (1) it cannot be determined whether it intends to impose the penalty prescribed upon the man who works less than eight hours in a day, or upon the man who works more than eight hours in a day, or upon both; (2) it cannot be determined whether it is intended to punish the employer, the employee, or both; and (3) it is so indefinite that, in fact, it cannot be said to forbid the employment of a laborer for more than eight hours in a day.

While it may be conceded that the intention of the lawmakers might have been expressed in plainer terms, we cannot hold a solemn legislative enactment of no force or effect because of the indefinite language in which it is couched, unless we find ourselves unable to divine the purpose or intent of the legislature. (Hochheimer on Criminal Law, 2d ed., sec. 28.) For, after all, the function of the court is to determine and make known, if possible, such purpose or intent; for the intention of the legislature is the essence of the law. In *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792, it is said: "The intention of the legislature in enacting a law is the law itself, and must be enforced when ascertained." In *Manhattan Co. v. Kalenberg*, 165 N. Y. 1, 58 N. E. 790, it is said: "In construing statutes the proper course is to start out and follow the true intent of the legislature, and to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." (2 Lewis' Sutherland on Statutory Construction, 2d ed., sec. 363.)

It is an elementary rule that effect must be given to a statute, if possible. If the statute is plain and unambiguous, so that no doubt can arise from the language employed as to its scope and meaning, then there is not any room for interpretation or

construction, and the reading of the statute itself is a sufficient declaration of its meaning. "When the meaning of a statute is doubtful, the reason and purpose of its enactment are to be taken into consideration in construing it and determining the intention of the legislature. In other words, though a penal statute cannot be extended by construction, it should, if possible, receive such a construction as, when practically applied, will tend to suppress the evil which the legislature intended to prohibit." (Clark & Marshall on the Law of Crimes, p. 97; 2 Lewis' Sutherland on Statutory Construction, 2d ed., secs. 528, 530.)

(1.) The history of labor legislation makes clear the evil to suppress which such statutes are enacted. It is the continuous employment of workingmen for such length of time as to imperil their lives or health that is sought to be avoided, and, in the interest of the general welfare of its citizens, the state undertakes to correct the evil as far as it may; or it may have been the purpose of the state to stamp with its approval the view now entertained by many, that, all things considered, the general welfare of workingmen, upon whom rests a portion of the burdens of government, will be best subserved if labor performed for eight hours continuously be taken as the measure of a full day's work; that the restriction of a day's work to that number of hours will so far promote the morality and improve the physical and intellectual condition of workingmen as to enable them the better to discharge the duties of citizenship.

With these objects in view, it cannot be supposed that the legislature intended to impose punishment upon every laborer engaged in any of the designated employments who fails to work for the full period of eight hours in every working day. But, on the other hand, it is apparent that the object and purpose in view were to prevent the employment of a laborer in any of such employments for more than eight hours in a day, that number of hours of continuous labor being fixed by the statute as the maximum for a day's work.

(2.) As it is the purpose of the statute to conserve the health and promote the happiness of the workingman—not to curtail his capacity to earn money or to set bounds upon the greed of his employer—the statute is written in terms broad enough to include within its inhibition both the employer and the employee. The language is: “Every person, corporation, stock company or association of persons who violates any of the provisions of section one of this Act shall be guilty of a misdemeanor,” etc.

In *Short v. Bullion-Beck etc. Co.*, 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603, a similar statute of the state of Utah was considered, and it was there held that the statute applies both to the employer and employee, and that the protection which the state throws around the citizen by the enactment of such a law cannot be waived even by the employee, the person for whose benefit the statute is primarily enacted. We do not think that in this respect the statute is at all indefinite, but, on the contrary, the meaning of the language employed seems to be plain.

(3.) It is said that the statute does not in terms prohibit the workingman from engaging in any of the designated employments for more than eight hours in a day, nor does it specifically prohibit the employer from hiring him to do so, and that, in fact, at most, the statute does not do more than define a working day. But the courts have not had difficulty in reaching an altogether different conclusion. The statute of Utah considered in *Short v. Bullion-Beck etc. Co.*, above, provides in section 1 (Session Laws, 1896, p. 219, Chap. 72) that the period of employment of workingmen in underground mines shall be eight hours per day. In section 2 the same language is employed with respect to mills and smelters for the treatment of ores. Section 3 provides: “Any person, body corporate, agent, manager or employer who shall violate any of the provisions of sections 1 and 2 of this Act shall be deemed guilty of a misdemeanor,” etc. Respecting this statute, the court said: “When the plaintiff [employee] voluntarily performed services at the request of the defendant [employer] in the mill, and

worked twelve hours, instead of eight hours, there was a violation of the statute. * * * When the defendant [employer] requested the plaintiff to work twelve hours each day, and plaintiff complied with that request, the law was violated by the act of each party."

In *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068, the supreme court of Missouri had under consideration a statute which requires that every electric street-car, other than trail cars which are attached to motor cars, shall be provided during certain months of each year with a suitable screen which shall fully and completely protect the driver, motorman, gripman, or other person guiding or directing the car from wind and storm. The penalty clause is as follows: "Any person, agent or officer of any association or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor," etc. The court held that this statute is not so indefinite or uncertain in its meaning as to be inoperative, but that it imposes upon every company or association of persons operating electric cars the duty of providing the screens on their cars, and makes subject to the penalty prescribed any person who, owning or operating such cars, operates them without screens during the designated months of the year.

The declared purpose of our statute is to impose a penalty upon everyone who violates the provisions of section 1 of the Act. And how may those provisions be violated? Manifestly in no other way than by the employee working more than eight hours in a day in any of the designated employments, or by the employer causing him to do so. The information in this case charges that the defendant company did unlawfully and willfully cause, suffer, and permit its servants to work for a longer period than eight hours in a day, and, if this be true, there was a clear violation of the statute by the defendant company; and it was no less a crime that its servants might also be equally guilty of the same offense.

In this connection it is said that the statute is exceedingly harsh and arbitrary, in that it limits the number of hours of

labor, even though the employee is working by the hour and paid according to the number of hours he works. But, when the purpose of the law is kept in mind, we think this criticism cannot be made. The object of the law is to conserve the health and promote the happiness of the workingmen by such reasonable regulations as will save them in the one instance from overwork, and, in the other, afford them ample time for rest, recreation, and their physical and mental improvement; and therefore it is quite immaterial whether the labor is performed by the day or by the hour. Its object is to limit the number of hours of labor in a day so far as the state may do so. The same criticism might be made of many other public statutes. Every law is a restraint upon some one, and the question of its harshness is only a relative one, depending largely upon the disposition of the person restrained, or the character of the business in which he is engaged.

It is further urged that the statute is harsh, in that no provision is made for cases of emergency where life or property is in peril; and it may be conceded that the Act would be more consonant with our ideas of a reasonable regulation if provisions had been made for such emergencies. But neither of these criticisms affects the validity of the Act. If it was the legislative will that no exception be made to the rule announced, the courts cannot say that a different policy should have been pursued. In fact, these objections only raise the question of legislative policy, with which the courts have nothing to do, unless it should be made to appear that in its operation the Act would be so unreasonable that it could not be supposed that the legislature ever intended it to have such effect. (20 Ency. of Law, 2d ed., 599.) Whether this statute in its operation will in fact prove to be harsh can only be determined by experience, and a probability that it will do so is not sufficient to condemn the Act in advance.

We are not called upon in this connection to decide whether or not, in the event a workingman had practically completed his eight hours of work upon one of the designated employ-

ments, and some emergency should suddenly arise whereby life or property was placed in imminent danger, such employee might not prolong his labor beyond the allotted time without violating the spirit of this statute. That question is not presented in this case, and it is therefore not considered nor decided.

2. In prefacing his brief, counsel for respondent insists that the amendment to the Constitution of Montana, prescribing the hours of labor in works or undertakings carried on or aided by any municipal, county, or the state government, and on contracts let by them, and in mills and smelters for the treatment of ores and in underground mines, approved by popular vote at the general election of 1904, was not properly submitted to the people, and therefore was not properly adopted. And while we do not agree with counsel in this contention, we do say that it is entirely immaterial whether we have such amendment in effect or not; for this question involves the construction of our statute with reference to the Fourteenth Amendment to the Constitution of the United States, and if our statute violates such Fourteenth Amendment, it would not aid it if we had a constitutional provision authorizing it, for in that event our constitutional provision would have to give way to the paramount authority of the Constitution of the United States.

But inquiry as to the constitutionality of this statute ought to be deemed foreclosed, for every feature of it has been before the supreme court of the United States and passed upon by that tribunal. Treated from a purely technical standpoint, the statute embraces two classes of employees: (1) Those engaged in works and undertakings carried on or aided by any municipal, county, or the state government, or on contracts let by them; and (2) those engaged in mills or smelters for the treatment of ores, or in underground mines. A case involving a statute applying to an employee of the first class arose in Kansas, where they have a statute similar to our own so far as applicable to that class of employees and in so far as it raises the question now under consideration. One Atkin had a con-

tract with Kansas City, Kansas, to provide the labor and materials and construct a brick pavement upon Quindaro Boulevard, a public street of that city, and, as such contractor, required one of his employees to work for ten hours per day in prosecuting such work. Atkin was charged with violating the Kansas eight-hour law, was convicted, the judgment affirmed by the supreme court of Kansas (*State v. Atkin*, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519), and by writ of error the case was taken to the supreme court of the United States, where every objection to the constitutionality of the Kansas statute was urged which is urged against our statute here.

Counsel for plaintiff in error in the *Atkin Case* argued: (1) That the statute of Kansas abridges the privileges of a citizen of the United States, and curtails his liberty with respect to his right to contract with the state or any of its subdivisions; (2) that the construction of the sidewalk in controversy was purely a local affair, with which the state has no concern; (3) that the statute denied to Atkin the equal protection of the laws; and (4) that it was conceded that the work was not dangerous to life, limb, or health, and that daily labor on it for ten hours would not be injurious to the laborer in any way, and therefore the statute could not be upheld as a police regulation. With respect to the first of these contentions the court said: "If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do."

Counsel for respondent in this case cites *Cleveland v. Clements Bros. Construction Co.*, 67 Ohio St. 197, 93 Am. St. Rep. 670,

65 N. E. 885, 59 L. R. A. 775, and *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, 52 L. R. A. 814, in support of the second contention above, which is also urged here. But these cases and several others were cited by counsel for plaintiff in error in the Atkin Case upon the same question, but without avail, and respecting that second contention the court said: "Such corporations are the creatures, mere political subdivisions, of the state for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are in every essential sense only auxiliaries of the state for the purposes of local government. * * * The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities the work was of a public, not private character." (*In re O'Brien*, 29 Mont. 530, 75 Pac. 196; *Wilcox v. Deer Lodge*, 2 Mont. 574.) The supreme court further said: "Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employee the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the state or of its municipal subdivisions, and alike to all employed to perform labor on such work."

With respect to the fourth contention the court said: "Some stress is laid on the fact, stipulated by the parties for the purposes of this case that the work performed by defendant's employee is not dangerous to life, limb, or health, and that daily labor on it for ten hours would not be injurious to him in any way. In the view we take of this case, such considerations are

not controlling. We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not by its regulations infringe the personal rights of others; and that has not been done." The court disposed of the controversy by saying that the statute of Kansas is not inconsistent with the Constitution of the United States, and that, "indeed, its constitutionality is beyond all question." (*Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148.) The decision in the *Atkin Case* is conclusive upon this court and decisive of the question presented here.

So far as the statute affects the other class—that is, workingmen employed in mills and smelters for the treatment of ores and in underground mines—its constitutionality is settled beyond controversy. (*Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Cantwell v. Missouri*, 199 U. S. 602, 26 Sup. Ct. 749, 50 L. Ed. 329.)

Finally, counsel for respondent says: "If the legislature has the power to deprive cities and their contractors of the right to agree with their workingmen upon the hours of labor or compensation, it has the same right and power to legislate in respect to private persons." But that this contention is erroneous must be deemed settled. In *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, the supreme court of the United States declared the general rule to be that the right of persons engaged in private business to make contracts in relation to such business is a part of the liberty of such persons, and is protected by the Fourteenth Amendment to the Constitution of the United States, and that this right includes the right to contract for labor, except where controlled by the state in the exercise of its police power.

So that the three cases—*Holden v. Hardy*, *Atkin v. Kansas*, and *Lochner v. New York*—seem to cover almost every possible

feature of labor legislation, except that relating to the employment of women or children, and they determine once for all (1) that with respect to work carried on or aided by any municipal, county, or state government, or on contracts let by them, or in private work of such character as to imperil the health or lives of the workingmen, as for instance, work in mills and smelters for the treatment of ores, and in underground mines, the state may prescribe reasonable rules regulating the hours of labor and the conditions under which such work shall be done; (2) with respect to contracts relating to other classes of private work (except where women or children are employed) the state may not interfere.

In the judgment of this court Chapter 50, page 105, Laws of 1905, is a valid legislative enactment, capable of being enforced. Under this view of the case, we are of the opinion that the information states a public offense.

The judgment of the district court is reversed, and the cause is remanded, with direction to vacate the judgment rendered and the order made allowing the demurrer, and to overrule the demurrer to the information.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

STATE, RESPONDENT, v. LEE, APPELLANT.

(No. 2,339.)

(Submitted November 14, 1906. Decided December 14, 1906.)

Criminal Law—Robbery—Record on Appeal—Bill of Exceptions—Instructions.

Criminal Law—Appeal—Record—Bill of Exceptions—Settlement—Notice.

1. Where it does not appear affirmatively from the record on appeal in a criminal case, that the two days' notice to the county attorney of the presentation of the bill of exceptions to the judge, or to the clerk for the judge, for settlement, required to be given by section 2171 of the Penal Code, had been given, the bill must be disregarded

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Same—Record of Former Trial—Authentication—Transcript.

2. The record of the proceedings had at a former trial of a criminal cause, copied into the transcript on appeal but not authenticated by bill of exceptions or identified in any way, cannot be considered for any purpose.

Same—Record—Amendment in Supreme Court.

3. Where the record on appeal in a criminal cause failed to show affirmatively that two days' notice of the presentation of the bill of exceptions to the judge for settlement had been given, an offer, made at the hearing before the supreme court, to amend the transcript by attaching thereto certain orders of the district court extending the time for settling the bill, which showed that the county attorney was present and took part in the proceedings had at the settlement, will not be entertained, such orders not being part of the record and not supplying the deficiency as to notice.

Same—Robbery—Instructions—Credibility of Witnesses—Harmless Error.

4. An instruction, given in a prosecution for robbery, which in effect told the jury that they were the exclusive judges of the credibility of the witnesses and had the right to reject all the testimony of any witness who in their opinion had been guilty of willful perjury "unless on any point such testimony is corroborated," could not have been understood by them otherwise than as a direction that they were not bound to accept any part of the statement as true, but that they were still at liberty to believe it or not as their judgment dictated, and could not be said to imply that if they found such testimony corroborated in any respect they should for that reason deem it credible. The instruction, while not technically correct, was not prejudicially erroneous.

(MR. JUSTICE MILBURN dissenting.)

Same—Robbery—Instructions.

5. Where two defendants were informed against jointly for the crime of robbery, each claiming a separate trial, an instruction requested on the trial of one of them, that if the jury found that he or his confederate, or either of them, did not take any property from the possession of the complaining witness, they must find defendant not guilty, was properly refused, in that he was not entitled to an acquittal merely because his confederate had not taken any of the property in question.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

MARION LEE, was convicted of robbery, and from the judgment and from an order denying him a new trial, he appeals. **Affirmed.**

Messrs. Maury & Hogevoil, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was heretofore convicted of the crime of robbery, but, on appeal to this court, the judgment of conviction was reversed because of a variance between the allegations in the information and the proof as to the name of the person injured. (*State v. Lee*, 33 Mont. 203, 83 Pac. 223.) When the case was remanded, he was tried on an amended information, and again convicted. He has appealed from the judgment and from an order denying him a new trial.

Counsel for appellant assign and argue in their brief many alleged errors, four of which are upon one instruction submitted and others refused, and hence are presented by the record proper, or judgment-roll, while the rest are sought to be presented by a bill of exceptions and what purports to be the record of the proceedings of the former trial, copied into the transcript without authentication. The attorney general insists that the matters embodied in the bill of exceptions and the record of the former trial may not be considered, for the reason that it does not appear affirmatively that the two days' notice to the county of the presentation of the bill to the judge, or to the clerk for the judge, for settlement, required by section 2171 of the Penal Code, was given, and that the record of the former trial is no part of the record of the trial of this cause.

The record before us does not disclose anything on the subject of notice to the county attorney of the settlement, and, under several decisions of this court directly in point, the bill must be disregarded. (*State v. Gawith*, 19 Mont. 48, 47 Pac. 207; *State v. Moffatt*, 20 Mont. 371, 51 Pac. 823; *State v. Stickney*, 29 Mont. 523, 75 Pac. 201; *State v. Kremer*, 34 Mont. 6, 85 Pac. 736; *State v. Morrison*, 34 Mont. 75, 85 Pac. 738.)

The record of the former trial copied into the transcript, not being authenticated by bill of exceptions or identified in any way, cannot be considered for any purpose.

At the hearing counsel for defendant offered to amend the transcript by attaching thereto orders of the court extending the time for settling the bill, made subsequent to the judgment, which show that the county attorney was present and took part in the proceedings had at the settlement, and asked to be allowed to make the amendment. The request was denied by the court, for the reason that these orders are not a part of the record and do not supply the deficiency.

This condition of the record leaves for consideration only the particular instructions complained of. Touching the credibility of witnesses and the functions of the jury in weighing their evidence, the court gave the following instruction: "No. 8. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence. You are the exclusive judges of the weight of the testimony and the credibility of witnesses. You are to determine what weight you will give to the testimony of any witness, and you will be slow to reject the testimony of any witness, and be careful, and, if you can reconcile any statement and all the testimony or any of the testimony of any witness with the facts and with the probable motives, it will be your duty to do so, but, if you should be satisfied that any witness has knowingly and willfully testified falsely to any material matter in this case, you have the right to reject the whole of the testimony of such witness, unless on any point such testimony is corroborated by the facts and circumstances of the case or other credible evidence." It is said that the last clause of this statement is, in effect, a direction to the jury that they could not reject any of the testimony of a witness who had committed deliberate perjury during the trial, if upon any point, however unimportant, he was corroborated by other credible evidence in the case, but that in such case they must accept and give it credit.

In *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648, it was said: "It is undoubtedly the rule that, where a witness has will-

fully sworn falsely as to any material matter upon the trial, the jury is at liberty to discard his entire testimony, except in so far as it has been corroborated by other credible evidence." Here the power of the jury to reject such evidence absolutely and without consideration is limited to that portion of it which is not corroborated. Such portion of it as is corroborated, the jury may not reject without consideration, but must weigh it in the light of the other evidence and attach to it such value as they think it entitled to under their power to judge of the credibility of witnesses generally.

In *State v. De Wolfe*, 29 Mont. 415, 74 Pac. 1084, the jury were instructed as follows: "If you believe that any witness who has testified in this case, has willfully and intentionally testified falsely as to any material matter in this case, the jury have a right to disregard any or all of the testimony of such witness." It was held that the omission of the exception was error, the court following the rule of *Cameron v. Wentworth*, *supra*, and approved in *Bonnie v. Earll*, 12 Mont. 239, 29 Pac. 882.

Section 3390 of the Code of Civil Procedure provides: "The jury, subject to the control of the court in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions. * * * 3. That a witness false in one part of his testimony is to be distrusted in others." The court in *Cameron v. Wentworth*, *supra*, considered this provision somewhat and held that its meaning is that a witness whose testimony is willfully false in a material matter is to be distrusted as to the whole of his testimony, thus importing into the statute the meaning which the legislature evidently intended should be given to it. There is serious doubt whether, in view of this provision, what is stated in *Cameron v. Wentworth* to be the undoubted rule is not logically wrong. (*People v. Sprague*, 53 Cal. 491; *People v. Righetti*, 66 Cal. 184, 4 Pac. 1063, 1185; *White v. Disher*, 67 Cal. 402, 7 Pac. 826; 2 Wigmore on Evidence, sec. 1012.) Yet, since this phase of the matter has not been argued

in this case, we shall not undertake to decide it, because the conclusion that it is wrong would necessitate the overruling of *Cameron v. Wentworth* and *State v. De Wolf*, which we do not care to do until the question is raised directly and properly argued.

We do not think, however, that the instruction complained of has the import which counsel give to it. In the first place, it was impressed upon the jury that they were the exclusive judges of the credit to be given to the witnesses. They were told that they had a right to reject all the testimony of any witness who had been guilty of willful perjury, unless "on any point" his statement was corroborated. The jury must have understood from this that they were not bound to accept any part of the statement as true, but that they were still at liberty to weigh it and believe it or not as their judgment dictated. In effect, the instruction told the jury that they might reject the testimony absolutely without consideration, unless on any point they found it corroborated, but any man of reasonable intelligence, reading it, would not understand that this implied that, if they found it corroborated in any respect, they should for that reason deem it credible and so treat it in making their finding. The only restriction cast upon them by this part of the instruction was that they were compelled to consider the testimony, but they were still left to give it such credit as they thought it entitled to. Manifestly, then, so understood, the instruction, while not technically correct under the cases cited, is not so substantially erroneous as to be deemed prejudicial to the defendant.

The instructions requested and refused were properly refused, because no one of them embodies a correct statement of the law. To illustrate: Instruction No. 6, after defining robbery in the words of the statute, reads as follows: "You are further instructed that one of the essential elements of robbery is the felonious taking of personal property; and in this case if you find that the defendant, Marion Lee, or Kail Yancey, or either of them, did not take any property from the possession of the complaining witness, you must find the defendant not guilty."

The defendant and Kail Yancey were informed against jointly. Each claimed a separate trial. This instruction would have told the jury that, if they found that either Marion Lee or Kail Yancey did not take any property from the possession of the complaining witness, the defendant, Marion Lee, should be found not guilty. Evidently, Marion Lee was not entitled to an acquittal solely on the ground, however conclusively the fact may have been established, that Kail Yancey had not taken any property from the possession of the complaining witness. The other paragraphs requested are open to the same or a similar objection.

Let the judgment and order be affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: I respectfully dissent. I do not think that the defendant Lee had a fair trial. Instruction numbered 8 is, in my opinion, erroneous and prejudicial. It is plainly wrong.

Rehearing denied January 12, 1907.

COULTER, RESPONDENT, v. UNION LAUNDRY COMPANY,
APPELLANT.

(No. 2,292.)

(Submitted October 8, 1906. Decided December 22, 1906.)

*Master and Servant—Personal Injuries—Master's Liability—
Defective Machinery—Assumption of Risks—Pleadings—Ap-
peal—Record—Nonsuit.*

Appeal—Record—New Trial Statement—Certification—Sufficiency.

1. Where the judge of a district court recites in his certificate settling a statement on motion for a new trial, that it contains all the evidence in the case, it is sufficient.

34	590
38	168

34	590
38	104
38	478

34	590
c40	524

Master and Servant—Personal Injuries—Patently Defective Machinery—Complaint—Sufficiency.

2. A complaint, in an action by an employee of a steam laundry for injuries claimed to have been sustained by plaintiff while working on a defective mangle, is not insufficient for failure to allege that the defect in the machine was known to defendant, where sufficient facts were set up to show that the defect was patent and not latent.

Same—Statutory Liability of Master—Injuries to Servant—Defenses.

3. In an action for personal injuries alleged to have been sustained by plaintiff, a laundry employee, while working on a patently defective mangle, the evidence showed that she was twenty-one years of age, had worked for fourteen months in laundries, was familiar with the construction and operation of the machine, knew the defect in it and had not notified defendant of its defective condition, but continued in the employment until she was injured. Section 2662, Civil Code, makes an employer liable to his employee for losses caused by the former's want of ordinary care. *Held*, that this section, under such circumstances, did not preclude defendant from offering any defense, though he did not use ordinary care in furnishing ordinarily safe machinery.

Same—Injuries to Servant—Assumption of Risk—Nonsuit.

4. Where the evidence in an action for personal injuries sustained by an operator of a patently defective mangle in a steam laundry was not conflicting, but was all to the effect that plaintiff, who was twenty-one years of age, knew and realized the defect and danger incident to working with it, she assumed the risk, as a matter of law, and a nonsuit was properly granted.

Same—Personal Injuries—Assumption of Risk—Pleadings—Waiver—Nonsuit.

5. Though, in an action for personal injuries, the defense of assumption of risk had not been properly pleaded, but the cause had been tried upon that theory of the defense, and plaintiff's evidence showed that she could not recover in any event, nonsuit was proper.

(MR. JUSTICE HOLLOWAY, dissenting.)

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Rilla M. Coulter against the Union Laundry Company. A motion for nonsuit was granted, and from an order granting a new trial defendant appeals. Reversed and remanded.

Mr. T. J. Walsh, and Mr. Wm. T. Pigott, for Appellant.

It must appear from the statement on motion for a new trial or the bill of exceptions that it contains all the evidence, and the certificate of the judge in settling the bill cannot supply such defect by having incorporated therein a statement to the effect

that the statement or bill settled does in fact contain all the evidence. (*Porter v. Stone*, 62 Iowa, 442, 17 N. W. 654; *Knott v. Bessmer*, 82 Iowa, 752, 48 N. W. 922; *Winstead v. Standeford*, 21 Kan. 270; *Rullman v. Barr*, 54 Kan. 643, 39 Pac. 179; *Newby v. Myers*, 44 Kan. 477, 24 Pac. 971; *Exendine v. Goldstein*, 14 Okla. 100, 77 Pac. 45; *Devine v. Silvers*, 8 Okla. 700, 58 Pac. 781; *Smith v. Alexander*, 67 Kan. 862, 74 Pac. 240; *Wade v. Gould*, 8 Okla. 690, 59 Pac. 11; *Bell v. Bell*, 60 Kan. 857, 56 Pac. 471.) And it not appearing that all the evidence is in the record, the propriety of the action of the trial court in granting the nonsuit could not be considered on the motion for a new trial, and it ought, accordingly, to have been denied. (*Lockey v. Horsky*, 4 Mont. 457, 2 Pac. 19; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307; *Nicholl v. Littlefield*, 60 Cal. 238.)

The plaintiff in action for negligence assumes the burden of establishing not only the defect, but knowledge of it on the part of the defendant, or, what is the same thing, such a state of facts as that the law will charge him with knowledge.

Being obliged to establish either actual or constructive knowledge by his proof, it follows, necessarily, that his complaint must aver such knowledge. (4 Thompson's Commentaries, 3864; 1 Abbott's Trial Brief, p. 591, sec. 373; 2 Labatt on Master and Servant, 856 et seq.; *Walkowski v. Tenokee & G. C. Mines*, 41 L. R. A. 133-145, note.)

Plaintiff knew the defect and the danger, so far as the danger was enhanced by the bent rail. There is no escaping the conclusion that, as a matter of law, from her own statement of the facts, she assumed whatever risk was attendant upon the use of this machine by reason of the condition of the guard-rail. The very circumstances have been repeatedly under consideration by the courts and the question before the court can be resolved upon a study of those presenting injuries sustained by operatives of mangles. (See *Blom v. Yellowstone Park Assn.*, 86 Minn. 237, 90 N. W. 397; *Jensen v. Regan*, 92 Minn. 323, 99 N. W. 1126; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 871; *Greef v.*

Brown, 7 Kan. App. 394, 51 Pac. 926.) The cases of *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42, and *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871, are clearly distinguishable. The defense of assumed risk is too thoroughly established in the law applicable to actions by a servant to recover for injuries sustained in the service to be displaced except by legislation. (See 4 Thompson's Commentaries, sec. 4608; 1 Shearman & Redfield on Negligence, sec. 209.)

Mr. E. A. Carleton, for Respondent.

An express allegation of knowledge on the part of the master of the defect in the machinery is not necessary. (*Warner v. Western etc. R. R. Co.*, 94 N. C. 250; *Crane v. Missouri Pac. Ry. Co.*, 87 Mo. 588; *Hall v. Missouri Pac. Ry. Co.*, 74 Mo. 298; *O'Connor v. Illinois etc. Ry. Co.*, 83 Iowa, 105, 48 N. W. 1002; *San Antonio etc. Ry. Co. v. Parr* (Tex. Civ. App.), 26 S. W. 861; *Chicago etc. Ry. Co. v. Hines*, 132 Ill. 161, 22 Am. St. Rep. 515, 23 N. E. 1021; *Hammond v. Schweitzer*, 112 Ind. 246, 13 N. E. 869; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Branch v. Port Royal etc. Co.*, 35 S. C. 405, 14 S. E. 808.)

The rationale of this doctrine, as laid down in the foregoing cases, is that the law imposes the duty upon the master not only to furnish safe machinery, etc., but to properly inspect the same and to see that the same is kept in a safe condition. This is a continuing duty. (4 Thompson on Negligence, sec. 3786.) The presumption is, that the master has performed his duty which the law charges him with a knowledge of, and hence the master must know of the condition of his machinery, tools and appliances with which his servants must work. (4 Thompson on Negligence, secs. 3794, 7527; 14 Ency. of Pl. & Pr., p. 340.) Where the defect is latent, there is some reason for requiring an averment of knowledge on the part of the master. (*Morris v. Bowers*, 105 Tenn. 59, 58 S. W. 328; *Evansville etc. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355; 6 Thompson on Negligence, sec. 7529.)

Under the common-law doctrine of assumption of risk, it is fundamental that the master is not liable "in all cases" for the master's want of ordinary care. The master may be guilty of the want of ordinary care at the common law, and he would not be liable to the servant were he guilty of contributory negligence, or if the risk were an assumed one. Section 2662 of the Civil Code, providing that an employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care, is not substantially the same as the common law, and hence, under section 3454 of the Code of Civil Procedure, may not be considered as continuing the common law on this point. The conclusion seems irresistible that the legislature has, in this instance, changed the rule of the common law, and in lieu thereof enacted section 2662, *supra*, imposing upon the master, in every case, the duty of exercising ordinary care in the selection of appliances, etc., upon penalty of being required to respond in damages if he fails so to do and injury to his servants results.

The common-law rule is inherently different from the statute under consideration. (6 Thompson, sec. 3986; 1 Labatt, sec. 14.) To say that the statute is simply declaratory of the common law is to say that the legislature did not mean what it said, and that the rules of interpretation of our Codes, as provided in section 3453 of the Code of Civil Procedure, and section 4652 of the Civil Code, are of no binding force when applied to the doctrine of the assumption of risk. Plainer language than that found in section 2662 of our Civil Code cannot be framed into a statute. It construes itself, and giving it its obvious meaning the master, to escape liability, must be free from the "want of ordinary care," in order to escape liability. (*Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lumber Co.* (Wash.), 83 Pac. 98; *Hoveland v. Hall Bros. Shipbuilding Co.* (Wash.), 82 Pac. 1090; *Ericson v. McNeeley & Co.* (Wash.), 84 Pac. 3.)

Knowledge of the defect in machinery on the part of plaintiff is not alone sufficient to take a case from the jury, unless the danger is so imminent that it can be said that all prudent

persons would refuse to continue to work with it. (2 Am. & Eng. Ency. of Law, p. 126; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Heavey v. Hudson etc. Co.*, 57 Hun, 339, 10 N. Y. Supp. 585; *Snedden v. Libera*, 65 Minn. 337, 68 N. W. 36; *Magee v. North Pac. Ry. Co.*, 78 Cal. 436, 12 Am. St. Rep. 69, 21 Pac. 114; *Sanborn v. Madera Flume etc. Co.*, 70 Cal. 266, 11 Pac. 710; *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 429; *Daubert v. Western Meat Co.*, 135 Cal. 144, 67 Pac. 133; *Lee v. Southern Pac. Ry. Co.*, 101 Cal. 118, 35 Pac. 572; *Franklin v. Missouri etc. Co.*, 97 Mo. App. 473, 71 S. W. 540; *Stager v. Troy Laundry Co.*, 38 Or. 480, 63 Pac. 647, 53 L. R. A. 459; *Habishaw v. Standard etc. Co.*, 131 Cal. 430, 63 Pac. 728.)

That nonsuit was properly denied, see *Fronk v. Evans City Steam Laundry* (Neb.), 96 N. W. 1053; *Stager v. Troy Laundry Co.*, 38 Or. 480, 63 Pac. 645, 53 L. R. A. 459; *Pearson v. Federal etc. Co.* (Wash.), 84 Pac. 633; *Tuckett v. American Steam & Hand Laundry* (Utah), 84 Pac. 500.

Plaintiff was injured while at work outside of that embraced in her contract of hiring; she, therefore, assumed no risk while at work on the mangle. (*McCabe v. Montana Cent. Ry. Co.*, 30 Mont. 323, 76 Pac. 703; *Railroad Co. v. Fort*, 17 Wall. 557, 21 L. Ed. 740; *Daubert v. Western Meat Co.*, 135 Cal. 144, 67 Pac. 133; *Pittsburg etc. Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Supple v. Agnew*, 191 Ill. 439, 61 N. E. 392; 4 Thompson, sec. 4614; *Martin v. California Central Ry. Co.*, 94 Cal. 329, 29 Pac. 645.)

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an action to recover damages for damage done to the respondent, in that her hand was caught, burned, and crushed by and between the rolls of a mangle, which machine she was working at appellant's laundry.

It is alleged in the complaint that the defendant is a corporation; that plaintiff was injured by the mangle about May 1, 1902; that she was hired by the concern about March 10, 1902,

to run a machine called a neckband ironer, and continuously worked for the defendant until the time of her injury. Soon after being thus hired she, in addition to running the ironer, was ordered by the foreman of the company to assist from time to time in running and operating the mangle, and that, after finishing her regular work on the neckband ironer, by the direction of the foreman she would assist other employees in running the mangle; that on the first day of May, while so assisting, and without fault on her part, as she alleges, her right hand was caught between the rollers of the mangle, they being of iron or steel and heated to a very high degree and revolving with great speed, and her fingers and hand were drawn in between the rollers, which were very close together. Her fingers and hand were severely burned and injured, and by reason of such injury she has been permanently disabled and prevented from following her occupation and incapacitated from doing any considerable work or labor.

It is further alleged that the defendant, regardless of its duty to provide fit, suitable, and reasonably safe machinery and appliances with which she could perform her duties while at work for the defendant, failed and neglected so to do, but, on the contrary, at the time the injury occurred it did carelessly, negligently, and recklessly furnish and provide an unsafe, defective and dangerous mangle for her to do her said work upon, and directed her to work with such dangerous and unsafe machine; that it was dangerous, unsafe and defective in this: That it had no reasonably safe and proper "guard," such as such machines should have, the guard being for the special purpose of protecting workmen in operating the machine; that the guard was twisted and bent out of its proper shape, so that it furnished little or no protection; that, as a result of the guard being twisted and bent, the machine became dangerous, defective and unsafe, by reason of which the injury was occasioned.

The defendant admits the employment and injury, but denies all the other material allegations of the complaint. "Further answering the said amended complaint, the defendant avers that

such injuries as the plaintiff received were received in consequence of the ordinary risk attendant upon the employment in which she was engaged, and for which she was employed, and which she had assumed; and that whatever defects there may have been in the said mangle, if there were any, were fully known to the plaintiff at the time she was injured and for a long time theretofore." Defendant also pleads contributory negligence. No point is made in the brief as to her alleged negligence. A replication was filed denying the new matter of the answer.

As to the facts in the case: It is undisputed that the plaintiff was seriously injured. The plaintiff was in her twenty-second year when she was hurt. In addition to the facts alleged in the complaint, the circumstances further appearing from plaintiff's own testimony are as follows: She says she was employed in the beginning to iron handkerchiefs and help with other ironing by hand, and, in addition to working the neckband ironer, she ironed handkerchiefs and plain clothes by hand, and that was all she was employed to do. She was put to work on the mangle by the man who employed her. A few days after she came to the place she was asked by the foreman to go and help on the mangle. She described in her testimony the machine called the "mangle" with great particularity, and showed that she was familiar with the manner of its working. On the second or third day she was directed to help on that machine. Part of the time she folded clothes and part of the time she would feed the machine. She says that she "helped out on it sometimes every day for a few days, and then again it would be a week or a few days that I didn't work on it at all. I did a little of everything, but I did more folding and shaking out than I did feeding." At the time a Mrs. Prickett, acting as "forelady," gave her orders to work on the mangle in the absence of the foreman. "About one-half of the time I was there I didn't work on the mangle at all. No more than three or four days out of the week would I feed the mangle, and sometimes I didn't do that, but helped on it. I didn't feed on it as much as I folded or shook out. On the same day we might do some feeding, some

folding, and some shaking out. There was a guard across the mangle, but the guard was sprung in the center. The guard is a brass rail that goes along over the brass plate that you push the clothes in under. At the ends [of the guard] I could only just get my fingers under it, but in the center I could easily put my hand under it. When the guard-rail was turned down you could not put anything under it, so it must have been sprung an inch or more. When I was employed there the guard was kept turned up. I never had any trouble in operating the mangle. On the first day of May I was hurt on it. We were putting some tablecloths in. The man stood at my right. He was holding one end of it, and I was holding the other, and we put it through the second time, and it was wrinkled in the center, and I had my right hand holding it down in the center to go smooth, and the first thing I knew, my right hand was caught between the rollers. The rollers were hot, being heated with steam, and revolving fast. My hand went up to the wrist." Again she stated, "I could not get my fingers under more than half way" at the ends of the guard-rail. The distance between the guard-rail and the rollers was about three or four inches. The rail protects the hand by striking it, and when the hand strikes the rail, one would know that the hand cannot be put further under and "you would pull it back very easily." At the time she was paying strict attention to her work, trying to get a wrinkle out of the tablecloth. "I have seen the mangle at 'Beck's' laundry often, and I saw it when they first put it up. I had worked for or with Mrs. Beck. I worked at the old Parisian laundry. That was about five years ago, if I remember right. I was employed at the laundry at that time. I worked there from June until December, five years ago. I was neckband ironer there, and occasionally I would be sent over to the mangle, but I almost always folded there. If I were operating the neckband ironer and that work was completed, I was sent to the mangle. I seldom worked at the mangle at Beck's. I don't believe I ever fed on it. I saw the machine operate while there. That was in 1901." After quitting Beck's she went later to work for the Union

laundry, which was the old Parisian laundry. "I had worked at that place about two years before. They had the same instrument the Union laundry had. I am certain that the guard-rail was bent in the middle * * * and I often heard the girls speak about it, and you could easily see it was bent. I knew it was bent some when I went to work there. It had been that way of my own knowledge. Anyone operating the machine could see that it was bent. I am positive of that. I didn't work more than fourteen or fifteen months in laundries altogether. I knew * * * if the hand should go between these two rollers it would be squeezed, and, of course, burnt."

A very able brief has been filed by each of the contending parties. The case was tried in the district court in Helena, in department No. 1. On motion, a nonsuit was granted. The case was afterward transferred to department No. 2, and a new trial was granted. The appeal is from the order granting a new trial.

Seven specifications of error are set out in the brief of counsel for the appellant, the defendant company. The first one—that is to say, that the court erred in granting respondent's motion for a new trial—includes all.

The first point raised is that the statement on motion for a new trial does not contain any recital that all the evidence introduced at the trial is contained therein, and that the only thing in the record to lead to such conclusion is the certificate of the judge settling the statement on motion for a new trial. All that is necessary for us to say on this point is that it has been heretofore settled by this court, and that it is no longer a matter of dispute, rightly or wrongly, that, when the judge in making his certificate (settling the statement) adds to it a recital that 'the foregoing statement contains all the evidence,' it is sufficient. (*Passavant v. Arnold*, ante, p. 513, 87 Pac. 905.)

The second point is that the complaint is insufficient in that it does not state that the defect in the mangle was known to the respondent company, or that it ought to have been known to it. There is not any presumption that the defendant in such a case knows of latent defects, if any. The complaint alleges sufficient

to show that this was a patent defect, and therefore it follows that defendant was charged with knowledge of its existence. But in this case the defect was apparent to any person looking at the machine, and there is sufficient allegation of knowledge on the part of defendant.

The defendant attempts in its answer to make two defenses: (1) Contributory negligence on the part of the plaintiff; and (2) assumption of risk, the latter being the one relied upon. The facts in this case show that Miss Coulter, without compulsion, worked several times a week during a period of about two months upon and about this machine, and that she was thoroughly familiar with the construction and operation of the same. The defect was known to her from the beginning and had been called to her attention by her fellow operators at the start. She saw the defect and she states that she knew the danger to herself. She was twenty-one years of age, and had worked for fourteen months in laundries which had these machines. She had worked on a mangle at another place. Query: Did she assume the risk? She saw the defect and realized the danger to herself, and continued in the employment at this machine for a long period of time until she was injured.

Section 2662 of the Civil Code is as follows: "An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care." The position of the respondent here is that this section precludes any defense on the part of the defendant employer, if he has not used ordinary care in furnishing ordinarily safe appliances. There is not any point made in this case, and the evidence does not disclose any facts to support it, that Miss Coulter had notified the defendant company of the defect and danger and had been promised that it should be remedied. And even if she had, under the authority of *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33, and others too numerous to mention, she would only be excused for remaining in the dangerous employment for a reasonable period after such notification of the

employer and his promise to remedy the same. No such condition is shown in this case.

If there were conflicting testimony as to whether or not this girl saw the defect and realized her danger and was, because of want of age or inexperience, incapable of arriving at a correct conclusion as to the situation, then such a case should have been submitted to a jury under proper instructions. But the testimony is all one way, indisputably supporting the theory of appellant that respondent knew and realized the defect and danger incident thereto, then, in case the cause had been submitted to a jury, there being no conflicting evidence on the subject, if the jury had found for the plaintiff, it seems to us that the court would have been compelled, on a proper motion, to set the verdict aside and grant a new trial. Such being our view, it seems to us that there is no other conclusion to draw than that the court should have taken the case from the jury, as it did. Respondent's counsel in his brief says: "The testimony fully shows that the guard was in a dangerous and defective condition during the entire period of time plaintiff worked for defendant, *and everybody knew it.*" In other words, the facts in the case as disclosed show that plaintiff knew the danger and assumed the risk. Thereby she made a contract, not against public policy as appears to us, to assume such risk.

We do not think that the defense of assumption of risk is pleaded explicitly in proper form and language, but the case having been tried upon that theory of the defense, and the plaintiff's testimony showing that she had no case, nonsuit was proper although that defense was not properly pleaded. (*Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867.)

Under a statute similar to ours, adopted with the Codes of California of 1872, the supreme court of that state twenty-seven years thereafter—that is, in 1899—in a personal injury case (*Limberg v. Glenwood Lumber Co.*, *supra*) held that: "Notwithstanding the negligence of a master in furnishing the servant with defective appliances, the servant assumes the risk of working therewith, and impliedly agrees to release the master from

liability therefor if he either continues to use them with knowledge of their dangerous character and without objection or protest, or continues to use them with like knowledge for an unreasonable time, after notification given to the master of their defective character, and after the servant has no right to expect that the defect will be remedied." The court says that it is not a question "of contributory negligence upon the part of the plaintiff, but rather: Did plaintiff assume the risk of working with these defective appliances? If there had been an express contract between the master and servant that the work should be done without a seat to the wagon, and with these identical lines, clearly that agreement would have barred a recovery in this action. * * * While the servant only assumes the dangers and risks necessarily incident to the work to be performed, he may, by contract, either express or implied, also assume the risk of working with defective appliances. Indeed, many cases go further and sustain the proposition that, where the servant proceeds at the outset to perform his work with defective appliances, having knowledge of the defect, then an implied contract arises to the effect that he assumes the risk—especially so if he is aware of the danger surrounding him by reason of the defect; and to say that the servant assumes the risk is but another way of saying that he impliedly agrees to release the master from liability. * * * And we know of but a possible exception to the rule, and that would be a case where the servant, though aware of the defect, was not aware of the danger incident to it. That exception cannot be urged here."

This *Limberg Case* was one in which plaintiff sued for damages for injuries alleged to have been caused by the want of ordinary care on the part of the defendant, in that he failed to furnish ordinarily safe appliances to the plaintiff after notification of the alleged defects, in that Limberg, being a driver of a lumber wagon, had furnished to him driving lines which were too short and a wagon without a seat, the allegation being that because of these defects in the appliances, he, under certain circumstances, fell from the wagon and received serious injuries.

The California supreme court in *Hennessy v. Bingham*, 125 Cal. 635, 58 Pac. 200, and *Matthews v. Bull* (Cal.), 47 Pac. 775, while considering section 1971, Civil Code of California (similar to our section 2662, *supra*), recognizes the doctrine of assumption of known risk as applicable where there has been that want of ordinary care mentioned in section 1971 (our section 2662).

The clear inference to be drawn from the language of this court in *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42, is that the doctrine of assumption of risk applies in this state under our Code in such a case as the one before us now. The injury occurred in 1896, but section 2662, *supra*, was not cited to the court in the *Coleman Case*. The section has never, since its enactment in 1895, been invoked to this court except in the case now before us.

In volume 20 of American and English Encyclopedia of Law, second edition, page 124, under the head of "Master and Servant," is found this statement: "If a servant knows of the danger in prosecuting the master's work, or if it is so patent that an ordinarily prudent man would have seen it, and he continues in the employment, without complaint, or without assurance of the master that the danger will be lessened or obviated, he cannot hold the master liable for injuries received in such employment, and the rule is the same with respect to those risks which first arise or become known to the servant during the service, as to those in contemplation at the original hiring." In support of this statement are cited *Limberg v. Glenwood Lumber Co.*, *supra*, and several hundreds of cases from forty states and territories, and from England and the United States. We do not think that the rule was changed by the adoption of section 2662.

The law being, in our opinion, as we have stated it, and the facts being uncontroverted, there seems to be no other conclusion to arrive at than that the assumption of risk appeared as a matter of law and the case was not one for the jury, and that the

nonsuit was properly granted on motion, and that the motion for a new trial was erroneously granted.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I dissent. The principal reliance of counsel for appellant, Union Laundry Company—in fact, for all practical purposes, it may be said, the only reliance—is upon this proposition: That although the risk to which Miss Coulter was exposed was an extraordinary one, still it was assumed by her by reason of the fact that such risk was known to her and the danger fully appreciated by her. The majority opinion declares that proposition to be the correct rule of law in this state. In my opinion, it is altogether impossible to reconcile such a conclusion with the provisions of our Civil Code. Independently of the statute, the majority opinion states a rule which has been quite generally followed, though in many instances with some modifications, by the courts of this country and in England. It may be said to be the common-law rule; but the mere fact that this rule is in effect in every state in the Union where there is no statute upon the subject, is no argument in favor of its enforcement in this state, where we have a statute declaring for a contrary doctrine.

Sections 2661, 2662, 4651 and 4652, among other things, provide:

“Sec. 2661. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is engaged.

“Sec. 2662. An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care.”

“Sec. 4651. * * * In this state there is no common law in any case where the law is declared by the Code or other statute. * * *

“Sec. 4652. * * * The Code establishes the law of this state respecting the subjects to which it relates. * * *

Of course, if the provisions of our Code were the same as the common law, they would be construed as continuations thereof; but that they are not such seems to me too plain for argument. Section 2661 simply declares, in effect, that the employee *only* assumes the *ordinary* risks of the business. The words "ordinary risks," as therein used, are to be given the meaning which they generally had at the time of the adoption of the Code. "Every risk which an employment still involves after a master has done everything that he is bound to do for the purpose of securing the safety of his servants is assumed, as a matter of law, by each of those servants. * * * The risks which are thus considered to have been assumed are those which are commonly described as 'ordinary.'" (1 Labatt on Master and Servant, sec. 3.) In other words, the servant's liability begins where the master's obligations end. But if the servant's injuries are attributable to the master's negligence, the risks to which the servant is exposed are not ordinary ones, and the master must indemnify him. This is the language of section 2662 above, in terms so plain that it seems to me they cannot be misunderstood.

To say that a servant, then, assumes any other than ordinary risks of the business in which he is engaged seems to me to render these two sections absolutely meaningless. The legislature evidently intended that these two sections, with section 2660, should form a complete Code upon the subject of the master's liability to the servant. The reason for the rule established by the Code is, that assumption of risk is a matter of contract, and at the time of making the contract of employment the parties cannot be said to have in contemplation any other than ordinary risks. Into every contract of employment there is, then, implied, on the part of the master, the promise to exercise reasonable care to furnish the servant with a reasonably safe place in which to work, reasonably safe appliances with which to work, and reasonably competent fellow-servants with whom to work; and on the part of the servant there is the implied agreement that he will assume the ordinary risks of the

employment, but, as said above, the servant's obligation only begins when the master's ends.

So far as our investigation discloses, the only other states having similar statutes are North Dakota, South Dakota, and California, and in not a single instance in any of these states can it be said that a case has been decided where the question of the servant's assumption of an extraordinary risk has been considered with reference to the statute. In *Matthews v. Bull*, the court was considering the question of the assumption of an ordinary risk. In *Hennessy v. Bingham*, it is only by the merest inference that it may be said that the court expressed itself upon the question now under consideration, and even such expression is nothing but *dictum*, as it was not involved in the decision of the case. In *Limberg v. Glenwood Lumber Co.*, the statute is not even mentioned. Our sections above were not mentioned or considered in *Coleman v. Perry*; and while it is true that for eleven years these personal injury cases have been considered in this state apparently without any reference to our statute, this fact does not appeal to me as an argument in justification of a decision, the direct effect of which, in my judgment, is to repeal section 2662 above. In my judgment, if our Code sections 2661 and 2662 mean what they say, there are not any circumstances under which a servant impliedly assumes an extraordinary risk.

Rehearing denied February 2, 1907.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPIN-
IONS DURING THE PERIOD EMBRACED IN
THIS VOLUME.

No. 2,269.—THE STATE OF MONTANA *EX REL.* LUKE
WILLIAMS, RESPONDENT, *v.* B. E. CALKINS, TREASURER,
APPELLANT.

*Appeal from District Court, Silver Bow County; Geo. M.
Bourquin, Judge.*

On motion to dismiss appeal.

Decided April 3, 1906.

PER CURIAM.—Upon motion of the respondent herein, this ap-
peal is hereby dismissed.

Mr. James E. Healy, for Appellant.

Messrs. Mackel & Meyer, for Respondent.

(607)

No. 2,160.—B. F. PIPPIER ET AL., RESPONDENTS, v. ROCKY
FORK COAL CO., APPELLANT.

*Appeal from District Court, Carbon County; Frank Henry,
Judge.*

Decided April 6, 1906.

PER CURIAM.—Upon motion of appellant the appeal herein
is dismissed as settled.

Messrs. Wallace & Donnelly, for Appellant.

Mr. T. J. Walsh, for Respondents.

No. 2,307.—THE STATE OF MONTANA EX REL. H. W.
STRINGFELLOW ET AL., RELATORS, v. L. K. DEVLIN,
C. W. LING ET AL., RESPONDENTS.

Original application for writ of *quo warranto*.

Decided May 4, 1906.

PER CURIAM.—Nothing appearing in the application herein
why this court should take original jurisdiction of this cause,
the same is hereby dismissed.

Mr. R. E. Hammond, for Relators.

No. 2,285.—THE STATE OF MONTANA, RESPONDENT, v.
GEORGE C. WATSON, APPELLANT.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

Decided May 4, 1906.

PER CURIAM.—For failure of appellant to file brief herein, the appeal is, on motion of respondent, hereby dismissed.

Messrs. Maury & Hogevoll, and Mr. John G. Brown, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.

No. 2,265.—W. D. STORY, APPELLANT, v. CHARLES PITMAN,
RESPONDENT.

Appeal from District Court, Carbon County; Frank Henry, Judge.

Decided May 14, 1906.

PER CURIAM.—The appeal herein is hereby dismissed as settled.

Mr. H. C. Crippen, for Appellant.

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No. 2,299.—THE STATE OF MONTANA, RESPONDENT. v.
WILLIAM E. YOUMANS, APPELLANT.

Appeal from District Court, Sweet Grass County; Frank Henry, Judge.

Decided May 28, 1906.

PER CURIAM.—Brief of appellant not having been filed within the time prescribed by the rules of this court, the appeal is, on respondent's motion, dismissed.

Mr. Sydney Fox, and Mr. Fred. H. Hathhorn, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.

No. 2,328.—THE STATE OF MONTANA EX REL. JOHN ENRIGHT ET AL., APPELLANTS, v. JOHN DORAN, JUSTICE OF THE PEACE, RESPONDENT.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

Decided June 22, 1906.

PER CURIAM.—Appellants' application for writ of supersedeas, or other appropriate writ, is hereby denied.

Mr. Jesse B. Roote, Mr. Peter Breen, and Mr. A. C. McDaniel, for Appellants.

No. 2,325.—JOHN J. SULLIVAN, RESPONDENT, v. BEN BANK
ET AL., APPELLANTS.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Decided June 27, 1906.

PER CURIAM.—Respondent's motion to dismiss the appeal herein is sustained and the appeal dismissed.

Messrs. Maury & HogevoU, for Appellants.

Mr. R. B. Smith, for Respondent.

No. 2,330.—THE STATE OF MONTANA EX REL. JOHN R.
COTTER ET AL., RELATORS, v. THE DISTRICT COURT
OF THE SECOND JUDICIAL DISTRICT ET AL., RE-
SPONDENTS.

Original application for writ of supervisory control.

Decided July 2, 1906.

PER CURIAM.—The relators' application for writ of supervisory control herein is hereby denied.

Mr. C. M. Parr, and Mr. J. M. Lewis, for Relators.

No. 2,327.—THE STATE OF MONTANA, RESPONDENT, *v.*
SWAN ANDERSON, APPELLANT.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

Decided October 2, 1906.

PER CURIAM.—Upon motion of appellant the appeal herein is hereby dismissed.

Messrs. Mackel & Meyer, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.

No. 1,737.—THE STATE OF MONTANA EX REL. JAMES
DONOVAN, ATTORNEY GENERAL, RELATOR, *v.* C. L.
BROWN ET AL., RESPONDENTS.

Original application for writ of mandate.

Decided October 2, 1906.

PER CURIAM.—Upon motion of Albert J. Galen, attorney general, this cause is hereby dismissed.

Messrs. H. J. Haskell, and Mr. T. C. Holmes, for Respondents.

No. 2,355.—POINDEXTER & ORR LIVE STOCK CO., RESPONDENT, *v.* TERRENCE FLYNN ET AL., APPELLANTS.

Appeal from District Court, Beaverhead County; Lew L. Callaway, Judge.

Decided October 6, 1906.

PER CURIAM.—Respondent's motion to dismiss the appeal herein, for the reason that the transcript had not been filed in time, is hereby sustained and the appeal dismissed.

Mr. Edwin Norris, and Mr. T. B. Poindexter, for Respondent.

No. 2,356.—TERRENCE FLYNN ET AL., APPELLANTS, *v.* POINDEXTER & ORR LIVE STOCK CO., RESPONDENT.

Appeal from District Court, Beaverhead County; Lew L. Callaway, Judge.

Decided October 6, 1906.

PER CURIAM.—Upon motion of respondent the appeal herein is hereby dismissed, the transcript not having been filed in time.

Mr. Edwin Norris, and Mr. T. B. Poindexter, for Respondent.

No. 2,323.—THE CITY OF LIVINGSTON, RESPONDENT, v.
LEE ET AL., APPELLANTS.

*Appeal from District Court, Park County; Frank Henry,
Judge.*

Decided October 8, 1906.

PER CURIAM.—Upon motion of respondent the appeal herein
is hereby dismissed.

Messrs. O'Conner & O'Connell, for Appellants.

Messrs. J. T. Smith, and Mr. O. M. Harvey, for Respondent.

No. 2,300.—ADA BROWN, RESPONDENT, v. RUFUS DUNLAP
ET AL., APPELLANTS.

*Appeal from District Court, Carbon County; Frank Henry,
Judge.*

Decided October 10, 1906.

PER CURIAM.—Upon motion of appellants, the appeal herein
is hereby dismissed.

Mr. C. L. Merrill, for Appellants.

No. 2,315.—FRANK E. BARNES, RESPONDENT, *v.* GRANITE
BI-METALLIC CON. M. CO., APPELLANT.

*Appeal from District Court, Granite County; Geo. B. Winston,
Judge.*

Decided November 3, 1906.

PER CURIAM.—The appeal herein is hereby dismissed as settled.

Mr. W. E. Moore, for Appellant.

Mr. W. L. Brown, for Respondent.

No. 2,376.—H. O. LYNG, RESPONDENT, *v.* BART ARMSTRONG,
APPELLANT.

*Appeal from District Court, Cascade County; J. B. Leslie,
Judge.*

Decided November 26, 1906.

PER CURIAM.—Respondent's motion to dismiss the appeal herein is hereby sustained and the appeal dismissed.

Mr. F. E. Stranahan, for Respondent.

No. 2,187.—LOUIS S. McCLURE, APPELLANT, v. MOSES MANUEL ET AL., RESPONDENTS.

Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge.

Decided December 13, 1906.

PER CURIAM.—This appeal is hereby dismissed as per stipulation of counsel.

Mr. F. P. Sterling, and Mr. E. W. Toole, for Appellant.

Messrs. Word & Word, for Respondents.

No. 2,346.—ANNIE VUKSINICH, RESPONDENT, v. THE GRAND LODGE A. O. U. W. OF MONTANA, APPELLANT.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Decided December 20, 1906.

PER CURIAM.—It is ordered that the appeal herein be and the same is hereby dismissed in accordance with praecipe on file.

Mr. Massena Bullard, for Appellant.

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ACCOMPLICES.

See Criminal Law, 60.

ADMINISTRATORS.

See Probate Proceedings; Wills.

ADMISSIONS.

See Criminal Law, 6.

ADVERSE CLAIMS.

See Mines and Mining.

AGENCY.

See Principal and Agent.

AMENDMENTS.

See Trial, 4, 5, 6.

AMENDMENTS TO CONSTITUTION.

See Constitution, 17-21.

APPEAL.

Justices' Courts—Final Judgments—Appealable Orders.

1. An order of the district court dismissing an appeal from a justice's court is not a final judgment from which an appeal lies, nor is it an appealable order under Code of Civil Procedure, section 1722, as amended by Laws of 1899, p. 146.—*Palmer v. Spaulding*, 1.

Criminal Law—New Trial—Bill of Exceptions.

2. Under section 2, Chapter 34, p. 48, Session Laws of 1903, the only manner of reviewing an order granting or refusing a new trial in a criminal case is upon a bill of exceptions incorporating the matters upon which it is based.—*State v. Kremer*, 6.

Criminal Law—Grand Larceny—Trial—Instructions—Review.

3. In a prosecution for larceny, an instruction that, if it was possible for the jury upon the evidence to account for the taking of the property mentioned, upon any reasonable hypothesis other than the guilt of defendant, they should do so, and find the defendant not guilty, cannot be said to be appropriate to every case, and, where the evidence is not before the supreme court on appeal, the refusal of the trial court to give such instruction will not be reviewed.—*State v. Kremer*, 6.

Error—Presumptions—Record.

4. Error will not be presumed by an appellate court; it must be made to appear affirmatively in the record to entitle it to consideration.—*State v. Kremer*, 6.

Criminal Law—Murder—Information—Sufficiency.

5. The question of the sufficiency of an information charging homicide may be raised for the first time in the appellate court.—*State v. Lu Sing*, 31.

Appealable Order—Criminal Law—Motion in Arrest of Judgment.

6. An appeal from an order overruling a motion in arrest of judgment does not lie on behalf of defendant. (Penal Code, sec. 2272.) *State v. Beesskove*, 41.

Criminal Law—Denial of Motion in Arrest—How Reviewable.

7. An order overruling a motion in arrest of judgment is an intermediate order, reviewable on appeal from the judgment. (Penal Code, sec. 2321.)—*State v. Beesskove*, 41.

Record—New Trial—Statement—Rules.

8. Rule VII, section 3, of the Rules of the Supreme Court, provides that *unless otherwise ordered by the district court*, the testimony contained in the transcript shall be reduced to narrative form. In a statement on motion for a new trial presented for settlement to the district court, extensive portions of the testimony were produced by question and answer. Objection made to this by the adverse party was overruled. *Held*, that the action of the court in overruling the objection was equivalent to an order to have the matter appear in the form it did.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

District Courts—Rules—New Trial—Statement.

9. A rule of the district court provided that the lines and pages in a statement on motion for a new trial should be numbered. To the settlement of a statement in the preparation of which this rule had been ignored, a technical objection was interposed and overruled. *Held*, that, since counsel did not invoke this rule for the purpose of facilitating labor in the settlement of the statement and making certain what was done respecting amendments, the supreme court on appeal will not interfere.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Default—Vacation—Appealable Order.

10. Under section 1722 of the Code of Civil Procedure, as amended by Session Laws of 1899, page 146, an order, made before final judgment, refusing to set aside a default is not appealable.—*Bowen v. Webb*, 61.

Default—Vacation—Discretion.

11. The granting or refusing to grant a motion to set aside a default being within the sound legal discretion of the trial court, the burden rests upon appellant to show a manifest abuse of such discretion by the court in denying a motion of this character.—*Bowen v. Webb*, 61.

Default—Affidavit of Merits—Answer—Presumptions.

12. Where, on appeal from an order denying a motion to open a default so as to permit defendant to file a demurrer to the complaint, the bill of exceptions recited that the motion had been heard upon the complaint, motion and affidavits, it will not be presumed that a proffered answer, which was neither identified nor referred to as a paper offered in support of the motion, was considered by the court as an affidavit of merits.—*Bowen v. Webb*, 61.

District Courts—Rulings—Presumptions.

13. Every presumption in favor of rulings of the district court will be indulged in the appellate court.—*Bowen v. Webb*, 61.

Error—Presumptions.

15. Error will not be presumed; it must be made to appear affirmatively.—*Bowen v. Webb*, 61.

Criminal Law—Record—Bill of Exceptions—Settlement—Notice.

16. Where it does not appear, on appeal in a criminal case, that the statutory notice (Penal Code, sec. 2171; Laws 1903, p. 47) had been given to the county attorney as to the time when the draft of the proposed bill of exceptions would be presented to the district judge for settlement, or that the state had waived such notice, the bill will not be considered by the appellate court.—*State v. Morrison*, 75.

Criminal Law—Record—Questions Reviewable—Admissibility of Evidence.

17. Where, on appeal in a criminal case, the evidence is not in the record, alleged errors in respect to the admission of evidence will not be considered.—*State v. Morrison*, 75.

Criminal Law—Briefs—Instructions.

18. Where the brief of appellant in a criminal case fails to comply with Rule X, subsection 3b, providing that, where error is alleged in the charge of the court, the instructions given or refused shall be set out in the specifications *in totidem verbis*, errors so assigned will not be considered.—*State v. Morrison*, 75.

Criminal Law—Record—Manner of Bringing Up.

19. The "record of the action" in a criminal case, as defined in Penal Code, section 2229, cannot be brought up on appeal in the body of a bill of exceptions.—*State v. Morrison*, 75.

Record—Judgment-roll—Bill of Exceptions.

20. *Obiter*: The judgment-roll in a civil case may not be brought to the supreme court on appeal in the body of a bill of exceptions.—*State v. Morrison*, 75.

Criminal Law—Review—Invited Error—Instructions.

21. Errors in instructions given at the request of the defendant in a criminal case may not be complained of by him on appeal.—*State v. Morrison*, 75.

Judgment of Dismissal—Affirmance—New Action—Limitations.

22. Where, in a suit for money had and received, a judgment of dismissal on the pleadings had been affirmed on appeal, it was terminated by such affirmance in a manner other than those mentioned in section 547 of the Code of Civil Procedure, and a second suit on the same cause of action, brought within a year after such termination, was not barred.—*Glass et al. v. Basin & Bay State M. Co.*, 88.

Briefs—Specification of Errors.

23. Where appellant's brief contains no specification of errors, as required by the Supreme Court X (30 Mont. xxxviii, 82 Pac. ix), the judgment will be affirmed.—*Hickey & Co. v. Kaufman et al.*, 106.

Justice of the Peace Courts—Statutes—Jurisdiction.

24. A notice of appeal from a justice of the peace to the district court was served on counsel for the opposite party on one day and not filed in the justice's court until three days later. A motion to dismiss the appeal on the ground that it had not been filed and served in accordance with the provisions of Code of Civil Procedure, section 1760, was overruled by the district court. *Held*, on application for writ of prohibition, that under this section the filing of the notice in the justice's court must precede, or be contemporaneous with, the service thereof on the adverse party or his counsel, and that by the failure of the appellant to observe the mandate of this section, the district court was not invested with jurisdiction of the cause.—*State ex rel. Hall et al. v. District Court et al.*, 112.

Justice of the Peace Courts—Statutes.

25. Appeals from justice of the peace to district courts are matters of statutory regulation, and the provisions of the law relative to the method to be pursued in taking such appeals must be strictly followed in order to divest the former of and invest the latter with jurisdiction.—State ex rel. Hall et al. v. District Court et al., 112.

New Trial—When Order Granting Motion Will be Affirmed.

26. An order granting a motion for a new trial which does not designate upon which of a number of grounds mentioned in the motion it was made, will be affirmed if justified by any one of them.—Case et al. v. Kramer, 142.

New Trial—Newly Discovered Evidence—Insufficiency of Evidence—District Courts—Discretion.

27. A motion for a new trial on the ground of newly discovered evidence, or insufficiency of the evidence to justify the verdict, is addressed to the discretionary power of the trial court, and its action thereon will not be disturbed on appeal unless it appears that there has been a clear abuse of such power.—Case et al. v. Kramer, 142.

New Trial—Conflict in Evidence—Affirmance.

28. Where the record on appeal shows that upon every issue presented by the pleadings the evidence introduced involves an irreconcilable conflict, an order granting a new trial will be affirmed.—Case et al. v. Kramer, 142.

Specifications of Error—Sufficiency.

29. Specifications of error, alleged to be insufficient to point out the particulars in which the evidence fails to justify the verdict, which give the defendant notice and advise the court in plain language of the matters that would be urged upon the hearing of a motion for a new trial, will be deemed sufficient.—Case et al. v. Kramer, 142.

Trial—Instructions—Request to Make More Definite.

30. Where appellant failed to request that an instruction be given setting forth fully the issues to be determined in a personal injury case, he may not complain of one which defined them in very general terms.—Hardesty v. Largey Lumber Co., 151.

Trial—Instructions—Commenting on Evidence.

31. An instruction commenting on the evidence was properly refused. Hardesty v. Largey Lumber Co., 151.

Dismissal—New Trial—Joint Motion—Record.

32. Where it appears from an order denying a motion for a new trial that two defendants joined in the motion, while the notice of appeal indicated that only one defendant made such motion, and where there is not anything in the record to show which defendant did so, the supreme court will, on its own motion, dismiss such appeal.—Anderson v. Northern Pac. Ry. Co. et al., 181.

Joint Appellants—Errors Considered.

33. On a joint appeal, errors not common to both appellants may be considered.—Anderson v. Northern Pac. Ry. Co. et al., 181.

Joint Appeal—Errors Which will not be Considered.

34. On a joint appeal, one appellant will not be permitted to assume a position antagonistic to that of the other.—Anderson v. Northern Pac. Ry. Co. et al., 181.

Assignments not Argued—Waiver.

35. Assignments of error not argued or discussed by counsel on appeal will be deemed waived.—Anderson v. Northern Pac. Ry. Co. et al., 181.

Invited Error—Instructions.

36. Where the district court at the request of appellant gave an instruction announcing an erroneous rule of law, but amended it in a particular which did not make it any more erroneous, the appellant may not complain.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

District Courts—Requested Instructions—Refusal to Correct.

37. The district court is not bound to correct a requested instruction by striking out a sentence announcing an erroneous rule of law and then to give it as corrected; while it may do so, error cannot be predicated upon its refusal.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Record—Evidence—Instructions.

38. In the absence of the evidence from the record on appeal, instructions, to be subject to review, must have been erroneous under any conceivable state of facts presented at the trial.—*Donovan-McCormick Co. v. Sparr*, 237.

Record—Absence of Evidence—Pleadings—Presumptions.

39. Every reasonable presumption will be indulged in favor of the action of the trial court; and in the absence of the evidence from the record on appeal, it will be presumed that instructions were warranted by the interpretation of the pleadings acted upon by the parties, and by the evidence in the case, unless the contrary appears.—*Donovan-McCormick Co. v. Sparr*, 237.

Instructions—Error—Prejudice—Presumptions.

41. In the absence of anything to show that prejudice could not reasonably have followed the giving of an erroneous instruction, and the error appearing, prejudice will be presumed.—*Martin v. City of Butte*, 281.

Appealable Orders—Probate Proceedings.

42. Under section 1722 of the Code of Civil Procedure, as amended by Act of 1899 (Laws 1899, p. 146), an order granting a motion to strike out objections to the final account of an executrix and to a petition for distribution of the estate, is not appealable.—*State ex rel. Cotter et al. v. District Court et al.*, 303.

Probate Proceedings—Erroneous Orders—How Reviewable.

43. *Obiter*: An erroneous order of the district court, while sitting in probate matters, settling the account of an executrix and directing distribution of the estate, may be reviewed on appeal, and on such appeal an error alleged to have been committed in striking out objections to the granting of the order might be considered.—*State ex rel. Cotter et al. v. District Court et al.*, 303.

Bills of Exceptions—Statements—Sufficiency—Evidence—Review.

44. Where a bill of exceptions or a statement on motion for a new trial does not point out the particulars wherein an alleged insufficiency of the evidence to justify the verdict or decision consists, the supreme court on appeal will not examine the evidence to determine its sufficiency.—*Martin v. Corscadden*, 308.

Administrators—Accounts—Allowance to Widow—Modification.

45. An administratrix whose account was so modified by an order of the district court as to strike out a portion of her allowance as widow of her intestate could not appeal from such order in her representative capacity, since as administratrix she was not aggrieved, the order only affecting her in her individual right.—*In re Dougherty's Estate*, 336.

Orders—Record—Bills of Exceptions.

46. On appeals from orders other than those granting or refusing new trials, the papers used on the hearing in the trial court must be made a part of the record by a bill of exceptions, settled in the usual way, and if not so incorporated, they are not properly a part of the record and cannot be considered on appeal.—*In re Dougherty's Estate*, 336.

Probate Proceedings—Record.

47. In the absence of specific provisions, in the Code of Civil Procedure, relating to new trials and appeals in probate proceedings as to the contents of the record in such cases, or the mode of authenticating it, the provisions regulating bills of exceptions, statements and appeals in ordinary actions are applicable and, so far as may be, the analogies between them must govern.—*In re Dougherty's Estate*, 336.

Probate Proceedings—Judgment-roll—Record.

48. While, technically, there is no judgment-roll in probate proceedings, the successive determinations of the court in the course of them, whenever directly or by implication declared by the statute to be final, must be regarded as final judgments, and the portions of the record upon which they are based must, on appeal, be regarded as the record for the particular determination.—*In re Dougherty's Estate*, 336.

Probate Proceedings—Administrators—Accounts—Settlement—Record.

49. On appeal from an order of the district court settling the account of an administratrix, the account, the written objections thereto, and the findings, and order of the court, together with a certified copy of the notice of appeal, *held* to be the judgment-roll for the purpose of the appeal, and a sufficient record to entitle the appeal to consideration on its merits.—*In re Dougherty's Estate*, 336.

Probate Proceedings—Record.

50. *Obiter*: Matters not forming part of the judgment-roll in a probate proceeding should be incorporated in a bill of exceptions or statement on motion for new trial, as the case may be, for purposes of appeal.—*In re Dougherty's Estate*, 336.

Probate Proceedings—Allowance to Widow—Appealable Orders.

51. An order granting an allowance to a widow out of the estate of her intestate is appealable, under Code of Civil Procedure, section 1722, as amended by Act of 1899 (Laws 1899, p. 146), and where an appeal therefrom is not taken within sixty days, it becomes final and conclusive and may not thereafter be attacked collaterally.—*In re Dougherty's Estate*, 336.

Bond—Sufficiency.

52. A bond on appeal from an order appointing a receiver, and from an order refusing to vacate the appointment, which recites that in consideration of "such appeal" defendant, as principal, and his surety, undertake to pay all damages and costs which may be awarded against defendant "on the appeal," is void for uncertainty in that it cannot be ascertained therefrom for which of the two appeals liability is assumed, and confers no jurisdiction on the appellate court.—*Faust v. Bustler M. & M. Co. et al.*, 368.

Void Undertakings—Curing Defects.

53. Where an appeal bond is void, a new undertaking approved by one of the justices of the supreme court, filed before the motion to dismiss was submitted, did not give the court jurisdiction of the appeal, since, under Code of Civil Procedure, section 1740, such sup-

plemental bond is only permissible where the original undertaking is merely insufficient.—Faust v. Rustler M. & M. Co. et al., 368.

Bonds—Jurisdiction.

54. *Obiter*: In the absence of anything in the record to show that an appeal bond had been filed or waived in writing, the supreme court is without jurisdiction to hear the appeal.—Faust v. Rustler M. & M. Co. et al., 368.

Constitutional Questions—Determination.

55. The constitutionality of a statute will not be inquired into by the supreme court, if an inquiry into that question is not necessary to a decision of the particular case before it.—State v. Aetna Banking & Trust Co., 379.

Criminal Law—Record—When Merits will not be Considered.

56. The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record, nor identified in any way by the certificate of the clerk of the district court or the trial judge.—State v. Farriss, 424.

Criminal Law—Record—Dismissal.

57. The supreme court will not hesitate to dismiss an appeal in a criminal case on the ground that the proper record is not before it, where appellant's attention had been called to the defect by the state's brief for a period of two months prior to the day of hearing, without any attempt on his part to have the record corrected so as to conform to the requirements of the statute.—State v. Farriss, 424.

Briefs—Rules of Supreme Court—Dismissal.

58. An appeal will be dismissed where appellant's brief fails to state what pleadings were filed, where they could be found, and what issues were raised, in compliance with paragraph 3, Rule X, of the Rules of the Supreme Court, which provides, among other things, that in cases in which transcripts are not printed, "the briefs shall contain so much of the record as is necessary to make out appellant's case." Alexander v. Great Northern Ry. Co. et al., 432.

Briefs—Rules—Instructions.

59. Instructions of which complaint is made by appellant, but which are not set out in his brief in *totidem verbis*, as required by Rule X, paragraph 3, subdivision b, of the Rules of the Supreme Court, will not be reviewed.—State v. Newman, 434.

New Trial—When Order Granting It will be Affirmed.

60. Where a motion for a new trial was made upon the grounds of newly discovered evidence, insufficiency of the evidence to justify the finding, and that the finding was against law, and the order sustaining it did not designate on which of the grounds it was made, the order will be affirmed if justified on any one of the grounds mentioned in the motion.—Fournier v. Coudert, 484.

New Trial—Finding Against Evidence—District Courts—Discretion.

61. If in the opinion of the trial court the evidence in a given case preponderates against the finding of the jury, it should be set aside, and where its action in granting a motion for a new trial can be justified upon that theory, the supreme court on appeal will not say that it abused its discretion in granting the motion.—Fournier v. Coudert, 484.

New Trial—Conflicting Evidence—District Courts—Discretion.

62. In the district court is lodged the sound legal discretion to grant or refuse a new trial in a case where the evidence is conflicting, and

its action in the premises will not be reviewed on appeal except for a manifest abuse of such discretion.—*Fournier v. Coudert*, 484.

Amendments—Continuance—Affidavits—Record.

63. Unless the affidavits embodying facts necessary to move the discretion of the court on applications for leave to amend a complaint after commencement of the trial, and for a continuance, are made part of the record by bill of exceptions, properly settled, they may not be considered on appeal.—*Borden v. Lynch*, 503.

Conversion—Damages—Evidence—Sufficiency.

64. Where, in an action for damages, for the conversion of personal property by a constable, the evidence, though conflicting as to the amount of damages sustained, would have warranted the jury in finding a much larger amount in favor of plaintiff than it did, the contention of defendant on appeal that the evidence was insufficient to sustain the verdict is without merit.—*Borden v. Lynch*, 503.

Conversion—Evidence—Fraud—Notes—Mortgages—Consideration.

65. Where, in an action in conversion, there was no substantial evidence adduced tending to show that a note, and a mortgage given on the personal property in controversy to secure the former instrument had their inception in fraud and were not based on a consideration, although there were some inconsistencies as to the question of consideration, the verdict in favor of plaintiff will not be disturbed on appeal.—*Borden v. Lynch*, 503.

Rulings on Evidence—Exceptions—Review.

66. Errors alleged to have been committed by the trial court in excluding offered testimony will not be considered on appeal, unless proper exceptions were reserved to the rulings or decisions complained of.—*Borden v. Lynch*, 503.

Trial—Witnesses—Examination.

67. For the district court to refuse a witness permission to answer a question, which had once before been answered, objection having been interposed, is not error.—*Borden v. Lynch*, 503.

Assignments of Error—New Trial Statement—Scope of Review.

68. Assignments of error on the giving and refusing of instructions which were not made in appellants' statement on motion for a new trial will be considered as though the record on appeal contained only the judgment-roll without the evidence.—*Haggerty Bros. v. Lash & Shaughnessy*, 517.

Claim and Delivery—Disposition of Cause.

69. Where, in an action in claim and delivery, the issue of ownership was correctly determined, but instructions going to the question of damages claimed for the wrongful detention of the property in controversy were erroneously given and refused, the cause will be remanded for a new trial of the issue of damages only, and, after a determination of their amount, the judgment ordered modified accordingly.—*Haggerty Bros. v. Lash & Shaughnessy*, 517.

Bonds—Principal and Surety—Creditors—Subrogation.

70. In an action to recover on an appeal bond, where it appeared that a stranger to the original action had deposited in bank a sum of money to indemnify the sureties on the bond, the principle of subrogation, embodied in section 3700 of the Civil Code, creating in favor of the creditor a trust which attaches to the property of the principal debtor when sought to be appropriated to the benefit of the surety, may not be invoked by the creditor.—*O'Neill v. State Savings Bank et al.*, 521.

Bonds—Sufficiency—Failure to Except—Presumptions.

71. From a failure to except to the sufficiency of sureties on an appeal bond, the presumption arises that it was sufficient.—*O'Neill v. State Savings Bank et al.*, 521.

Bonds—Principal and Surety—Withdrawal of Indemnity—Objections.

72. Where a stranger to an action in which an appeal bond was required, deposited a sum of money to indemnify the sureties, no one but the sureties could object to the withdrawal of the indemnity; and, such objection not having been made, the court properly awarded the sum deposited to the heir of the deceased depositor.—*O'Neill v. State Savings Bank et al.*, 521.

District Court—Reopening Case—Discretion—Review.

73. To permit a case to be reopened for the purpose of hearing further proof in a civil case, lay within the discretion of the trial court, and its action in the premises is reviewable only in case of abuse of such discretion.—*O'Neill v. State Savings Bank et al.*, 521.

Evidence—Record—New Trial Statement—Review.

74. In the absence of certain ordinances from the statement on motion for a new trial, introduced on the trial of an action against a city for personal injuries alleged to have been sustained by reason of a defective sidewalk, ostensibly showing that it was incumbent on the street commissioner and the chief of police to look after the streets, the sufficiency of the evidence to go to the jury as to defendant's notice of the defect in the sidewalk will not be reviewed, since the duties of such officers may have been such as to make daily inspections of streets and sidewalks, in which event notice may be presumed.—*Kelly v. City of Butte*, 530.

Evidence—Sufficiency—Record.

75. Evidence will not be reviewed on appeal to determine its sufficiency where the record fails to show affirmatively that all, or the substance of all, the evidence in the case is before the appellate tribunal.—*Kelly v. City of Butte*, 530.

Rulings in Appellant's Favor.

76. Appellant may not complain of a ruling in his favor.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Evidence—Admissibility—Objections.

77. Counsel of appellant may not complain in the supreme court of a ruling of the district court, with reference to the admission of evidence, on a ground the reverse of that assigned in the trial court.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Eminent Domain—Verdict—Review.

78. Where the evidence taken as a whole gave substantial support to the findings of the jury in favor of defendants in condemnation proceedings, their verdict will not be disturbed on appeal, although the statements of many of the witnesses were conflicting and unsatisfactory upon material points.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Criminal Law—Record—Bill of Exceptions—Settlement—Notice.

79. Where it does not appear affirmatively from the record on appeal in a criminal case, that the two days' notice to the county attorney of the presentation of the bill of exceptions to the judge, or to the clerk for the judge, for settlement, required to be given by section 2171 of the Penal Code, had been given, the bill must be disregarded.—*State v. Lee*, 584.

Record—New Trial Statement—Certification—Sufficiency.

80. Where the judge of a district court recites in his certificate settling a statement on motion for a new trial, that it contains all the evidence in the case, it is sufficient.—*Coulter v. Union Laundry Co.*, 590.

APPEALABLE ORDERS.

See Appeal, 1, 6, 7, 10, 42, 43, 45, 46, 51.

ARGUMENT TO JURY.

See Attorneys 10, 11.

ARREST OF JUDGMENT.

See Criminal Law, 24, 25, 26.

ASSESSOR AND ASSESSMENT.

See Taxation, 4, 5, 6, 7, 8, 9.

ASSIGNMENT.**Torts—Causes of Action—Satisfied Claim—Release.**

1. The owner of a horse let the same to plaintiff, a livery-stable keeper, who hired the horse to defendant to drive. After being driven the horse died from the alleged negligence of defendant, whereupon the owner asserted a claim against both plaintiff and defendant. Plaintiff admitted the owner's claim, paid him the value of the horse in satisfaction thereof, and took an assignment of the owner's cause of action against defendant, and as such assignee sued defendant to recover the value of the horse, alleging that the cause of its death resulted from defendant's negligence. *Held*, that, as plaintiff's payment of the value of the horse to the owner thereof satisfied any cause of action that he had for the loss of the horse, plaintiff was not entitled to recover for such loss as the owner's assignee.—*Tanner v. Bowen*, 121.

ASSUMPTION OF RISK.

See, also, Personal Injuries, 2, 5, 11, 17, 33, 34.

Master and Servant—Personal Injuries—Assumption of Risk.

1. *Quære*: Is the doctrine that a servant, knowing of an existing danger, is excusable where he was injured while engrossed in the performance of his duties, by reason of an emergency which absorbs his whole attention, so that for the time being he forgets the danger or his close proximity to it, applicable against the defense of assumed risk? *Anderson v. Northern Pac. Ry. Co., et al.*, 181.

ATTORNEYS.

See, also, Contempt, 1.

Default—Motion to Vacate—Press of Business.

1. Affidavits submitted on an application to open a default, showing merely a press of business engagements on the part of defendant's attorney, which called him out of his office a great deal of the time, and caused him to mistake the day on which he was required to make his appearance, cannot be said to establish excusable neglect.—*Bowen v. Webb*, 61.

Criminal Law—Homicide—Misconduct—Abuse of Witnesses.

2. In a prosecution for homicide an attorney employed by the widow of deceased to assist the state's attorney, who in course of the examination of a hostile witness, whom the court had compelled the state to call, and whose conduct toward counsel was exasperating and impertinent—remarked that the prosecution did not vouch for the witness, that he could not tell the truth, asked the witness whether he was *non compos mentis* or knew anything at all, and stated that witness unqualifiedly lied and was a "self-deluded fool that knew nothing," was guilty of such misconduct as will work a reversal of the judgment of conviction if properly presented for review.—*State v. Trueman*, 249.

Criminal Law—Objectionable Evidence—Misconduct.

3. Counsel for the state, in a prosecution for homicide, sought to get before the jury the fact that the deceased had left surviving him a widow and a small child. He proved this fact, over objection, but upon motion of defendant's counsel this testimony was later stricken out. Immediately upon this ruling, counsel for the prosecution called the widow and, by questions asked for that purpose, again brought the matter ordered stricken to the attention of the jury, and thereupon consented to the striking of this testimony. *Held*, that the behavior of counsel in asking questions which he knew, or had reason to believe, in view of the previous ruling, the court would not permit to be answered, constituted misconduct which, if properly presented, will work a reversal of the judgment of conviction.—*State v. Trueman*, 249.

Probate Proceedings—Appointment of Attorneys for Minors.

4. The district court, in its discretion, may, in probate proceedings, under section 2925 of the Code of Civil Procedure, appoint an attorney for minor heirs.—*State ex rel. Cotter et al. v. District Court et al.*, 306.

Probate Proceedings—Order Appointing Attorney for Minors.

5. *Certiorari* is not the proper remedy to review an order of the district court made in probate proceedings, vacating an order, theretofore made, appointing an attorney for minor heirs.—*State ex rel. Cotter et al. v. District Court et al.*, 306.

Change of Venue—Liability for Costs—Mandamus.

6. Where a criminal cause is removed from one county to another for trial, it is the duty of the county to which it is transferred to furnish a prosecuting officer, and if for any reason its county attorney is unable to act as such officer in the trial of the cause and the court appoints special counsel to represent the state, the cost incident to his employment is not a proper charge against the county from which the change of venue was had, and therefore *mandamus* will not issue to compel its payment by that county.—*State ex rel. Cascade County v. Lewis & Clark County et al.*, 351.

Forgery—Bounty Certificates—Statutes.

7. The district court ruled correctly when it denied a motion of defendant, on trial for forging a bounty certificate, that the county attorney be required to state whether the prosecution was proceeding under section 3078 of the Political Code, which provides that any person who shall falsely make or counterfeit a bounty certificate shall be guilty of forgery, or under section 840 of the Penal Code, defining the crime of forgery, there being no rule of law making it incumbent on that officer to make known under what section of the Code a defendant is being tried.—*State v. Newman*, 434.

Forgery—Bounty Certificates—Appeal—Prejudice.

8. Where, before the defense of one charged with forging a bounty certificate was begun, it was definitely stated that the prosecution was being conducted under section 3078 of the Political Code, defendant was not prejudiced by a ruling theretofore made overruling his motion that the county attorney be required to state under what particular section of the Code he was proceeding.—*State v. Newman*, 434.

Attorney's Lien—Foreclosure—Prior Mortgage—Tender—Complaint.

9. The complaint in a suit to foreclose an attorney's lien on property upon which a prior mortgage was outstanding need not allege that tender of payment of the mortgage lien had been made to the mortgagee, since such tender is not a condition precedent to the bringing of a suit in foreclosure of the attorney's lien.—*Gilechrist v. Hore*, 443.

Argument to Jury—Reading Law.

10. *Semble*: Whether an argument in an argument to the jury may read excerpts from an opinion rendered by the supreme court on an appeal of a civil cause then on trial for the second time, seems to rest in the sound discretion of the court, and its action in permitting it to be done is not reversible error so long as the portions read do not state or comment on the facts, or disclose what the result of the first trial or the appeal had been.—*Mahoney v. Dixon et al.*, 454.

Argument—Reading Law to Jury.

11. Where, in an action against a notary for damages flowing from a false certificate to an acknowledgment of a mortgage, it was contended by defendants that plaintiff's testimony as to the reliance he had placed on the certificate before he loaned his money was in direct conflict with his statements made on a former trial of the cause, and counsel for defendants in his argument read to the jury a portion of the opinion of the supreme court rendered in the same case on appeal, to the effect that if plaintiff had not relied on the correctness of the certificate he could not recover,—with the apparent purpose of illustrating to the jury why it had become necessary for plaintiff to change his testimony in this respect,—the court did not abuse the discretion lodged in it in permitting the reading of the excerpt in question.—*Mahoney v. Dixon et al.*, 454.

ATTORNEYS' LIENS.

See Pleading and Practice, 16, 17.

BANKS.

See, also, Taxation, 3, 4, 5, 9, 10.

State Examiner—Penal Statutes—Construction.

1. Chapter C, Laws of 1903, page 184, relating to the state examiner and providing penalties for failure of banks, investment companies, etc., to comply with its requirements, must be strictly construed.—*State v. Aetna Banking & Trust Co.*, 379.

Foreign Banking Companies—State Examiner—Statutes.

2. *Held*, that foreign banking corporations doing business in this state were not intended by the legislature to be included within the provisions of section 497 of the Political Code, as amended by Act of 1903 (Laws 1903, Chap. C, p. 184), which creates the state examiner's fund and imposes upon "each bank, banking corporation,

savings bank, investment and loan company, incorporated under the laws of this state" the duty of paying into this fund certain fees; and that, therefore, such a concern is not subject to the penalties prescribed in section 498 for a noncompliance with the provisions of section 497.—*State v. Aetna Banking & Trust Co.*, 379.

Foreign Banking Companies—State Examiner—Statutes.

3. The proviso in section 15 of the Act of 1905 (*Laws* 1905, Chap. 104, p. 232),—which Act regulates, among others, foreign banking corporations doing business in the state,—to the effect that the legislation shall not apply to any such concerns doing business in the state openly and lawfully at a fixed place at the time of its approval, may not be eliminated, if invalid, so as to permit the remainder of the Act to stand, since it is not apparent that the proviso was not an inducement to the legislature in passing the Act, and, by elimination of the proviso by judicial construction, such a corporation would be made amenable to the penalties provided by the Act, contrary to the desire of the legislature at the time of its passage. *State v. Aetna Banking & Trust Co.*, 379.

Credits—Taxation.

4. Moneys due from other banks or bankers are credits within the definition of that term in section 3680 of the Political Code.—*Clark et al. v. Maher et al.*, 391.

BILLS OF EXCEPTIONS.

See, also, Record, 2, 6, 8; Criminal Law, 32, 78, 79, 80; Appeal.

Criminal Law—New Trial—Appeal.

1. Under section 2, Chapter XXXIV, p. 48, Session Laws of 1903, the only manner of reviewing an order granting or refusing a new trial in a criminal case is upon a bill of exceptions incorporating the matters upon which it is based.—*State v. Kremer*, 6.

Settlement—Criminal Law—Notice—Statutes.

2. *Held*, that the provisions of section 2171 of the Penal Code, and of section 1 of Chapter XXXIV, page 47, Session Laws of 1903, relating to the settlement of bills of exceptions in criminal cases, and providing that the draft of a proposed bill must be presented, upon at least two days' notice to the adverse party, to the judge for settlement or delivered to the clerk for the judge, are mandatory; that the giving of such notice is an indispensable prerequisite to the consideration of the bill by the supreme court, and that the record must show affirmatively the fact of the giving of such notice.—*State v. Kremer*, 6.

Delivery of Copy to Adverse Party—Notice—Criminal Law.

3. Delivery of a copy of a proposed bill of exceptions to the county attorney, in a criminal case, does not meet the requirements of Penal Code, section 2171, and section 1, Chapter XXXIV, Laws of 1903, page 47, relative to notice of at least two days to the adverse party prior to delivery of such bill to the judge for settlement.—*State v. Kremer*, 6.

District Court—New Trial—Statement—Rules.

4. Rules of district courts relative to preparation and arrangement of statements on motion for new trial and bills of exceptions are not made for the purpose of punishing a delinquent party, but to aid counsel and court and to make certain what is done.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Appeal—Records—Judgment-roll.

5. *Obiter*: The judgment-roll in a civil case may not be brought to the supreme court on appeal in the body of a bill of exceptions.—*State v. Morrison*, 75.

Statements—Sufficiency—Evidence—Review.

6. Where a bill of exceptions or a statement on motion for a new trial does not point out the particulars wherein an alleged insufficiency of the evidence to justify the verdict or decision consists, the supreme court on appeal will not examine the evidence to determine its sufficiency.—*Martin v. Corscadden*, 308.

Statutes—Retroactive Effect.

7. The Act of 1905 (Laws 1905, c. 92, p. 185), amending sections 1152 and 1173 of the Code of Civil Procedure, so as to dispense with the specification of particulars, in bills of exceptions and statements on motion for new trial, in which the evidence is alleged to be insufficient to justify the verdict or decision, has no application to bills or statements settled prior to its enactment.—*Martin v. Corscadden*, 308.

Their Purpose.

8. The purpose of a bill of exceptions is to incorporate in authentic form, as a part of the record, proceedings on the trial, including rulings of the trial judge alleged to be erroneous, the objections and exceptions taken thereto, with the grounds thereof, which would not otherwise appear in the record.—*In re Dougherty's Estate*, 336.

Appeals—Orders—Record.

9. On appeals from orders other than those granting or refusing new trials, the papers used on the hearing in the trial court must be made a part of the record by a bill of exceptions, settled in the usual way, and if not so incorporated, they are not properly a part of the record and cannot be considered on appeal.—*In re Dougherty's Estate*, 336.

BONDS ON APPEAL.

See Appeal, 52, 53, 54, 70, 71, 72.

BOUNTIES AND BOUNTY CERTIFICATES.

See, also, Criminal Law, 45, 46, 47, 48, 49, 72, 73, 74, 76, 77.

Bounties—Who Entitled Thereto.

1. *Obiter*: Under section 3071 of the Political Code, as amended by Session Laws of 1903, page 166, only the person who kills certain wild animals is entitled to bounty, and by selling the skins of such animals to another he waives his right to the bounty, the person purchasing them acquires no right to bounty, and the state is released from any liability thereon.—*State v. Newman*, 434.

BOUNTIES AND BOUNTY INSPECTORS.

See Criminal Law, 45, 46, 47, 48, 49, 72, 73, 74, 76, 77; Statutes, 19, 21, 25.

BRIEFS.**Criminal Law—Appeal—Rules of Supreme Court—Instructions—Review.**

1. Where the brief of appellant in a criminal case fails to comply with Rule X, subsection 3b, providing that, where error is alleged in the charge of the court, the instructions given or refused shall be set

out in the specifications in *totidem verbis*, errors so assigned will not be considered.—*State v. Morrison*, 75.

Appeal—Specification of Errors—Rules of Supreme Court.

2. Where appellant's brief contains no specification of errors, as required by Supreme Court Rule X (30 Mont. xxxviii, 82 Pac. ix), the judgment will be affirmed.—*Hickey & Co. v. Kaufman et al.*, 106.

Specifications of Error—Sufficiency—Appeal.

3. Specifications of error, alleged to be insufficient to point out the particulars in which the evidence fails to justify the verdict, which give the defendant notice and advise the court in plain language of the matters that would be urged upon the hearing of a motion for a new trial, will be deemed sufficient.—*Case et al. v. Kramer*, 142.

Appeal—Rules of Supreme Court—Dismissal.

4. An appeal will be dismissed where appellant's brief fails to state what pleadings were filed, where they could be found, and what issues were raised, in compliance with paragraph 3, Rule X, of the Rules of the Supreme Court, which provides, among other things, that in cases in which transcripts are not printed, "the briefs shall contain so much of the record as is necessary to make out appellant's case."—*Alexander v. Great Northern Ry. Co.*, 432.

Appeal—Rules of Supreme Court—Instructions.

5. Instructions of which complaint is made by appellant, but which are not set out in his brief in *totidem verbis*, as required by Rule X, paragraph 3, subdivision b, of the Rules of the Supreme Court, will not be reviewed.—*State v. Newman*, 434.

Failure to File—Dismissal of Appeal.

6. An appeal in a criminal case will be dismissed where appellant fails to file brief.—*State v. Watson*, 609; *State v. Youmans*, 610.

BROKERS.

See Contracts, 4, 5, 6, 7, 8.

BURDEN OF PROOF.

See, also, Claim and Delivery, 2; Contracts, 7, 8; Conversion, 4.

Master and Servant—Personal Injuries—Negligence—Presumptions.

1. While the general rule of law is that negligence is not inferable from the mere occurrence of an accident, yet where the thing which causes the injury is shown to be under the management and control of defendant and the accident is of such a nature as to make it apparent that, but for the failure of those in control to use proper care, it would not have happened, proof of the accident raises a presumption of defendant's negligence and casts upon him the burden of showing that ordinary care was exercised.—*Hardesty v. Largey Lumber Co.*, 151.

Money Paid—Instructions—Proving Negative.

2. An instruction, given in an action to recover money alleged to have been paid for the use and benefit of defendant in the purchase of certain shares of stock, which told the jury that the burden of proving that it did not buy the stock on its own account was upon the plaintiff corporation, while not to be commended as a mode in which to present a question in controversy to the jury, may not be said, in the absence of the evidence from the record, to impose upon plaintiff any greater burden than that which have been imposed had the jury been informed that the burden was upon plaintiff to show that the

stock was purchased for defendant, since proof of either alternative disproved the other.—*Donovan-McCormick Co. v. Sparr*, 237.

Brokers—Instructions—Burden of Proof.

3. Where the attendant facts and circumstances in the making of an agreement are resorted to as an aid to an understanding of it, no greater burden rests upon the promisor than to show by a preponderance of the evidence that the promisee understood it as he (the promisor) believed he understood it (Civil Code, sec. 2214); and instructions, submitted in an action to recover for services as brokers to sell real estate which advised the jury that plaintiffs' (promisees') right of recovery depended upon whether they understood the contract in question in a certain way, laid down an erroneous rule of law.—*Blankenship et al. v. Decker et al.*, 292.

Malicious Prosecution—Probable Cause—Malice.

4. Where, in an action for malicious prosecution, the proof tends to show absence of probable cause, a *prima facie* case is made for the jury, and the burden then rests upon the defendant to rebut the same by evidence tending to show probable cause and want of malice on his part.—*Martin v. Corscadden*, 308.

CAUSES OF ACTION.

See Assignment, 1.

CERTIORARI.

See, also, Probate Proceedings, 7; Contempt, 4.

Contempt—Judgment—Record—Sufficiency.

1. Under Code of Civil Procedure, section 2172, an order declaring a person guilty of a direct contempt must recite the facts upon which the conclusion that the contemnor is guilty is based. The district court in an order adjudging an attorney at law guilty of such contempt merely recited that while the court was in session, the contemnor addressed it in an insolent manner and contemptuously attempted to call the presiding judge as a witness to prove certain scandalous matter. *Held*, on *certiorari*, that the order—the record of the case—was insufficient to meet the requirements of section 2172 *supra*.—*State ex rel. Breen v. District Court et al.*, 106.

Contempt—Record.

2. On *certiorari* to review an order of the district court adjudging one guilty of a direct contempt, the supreme court may not look beyond the order adjudging the contemnor guilty—which constitutes the record of the case (Code Civ. Proc., sec. 2172)—to determine from the facts whether or not the judgment was proper.—*State ex rel. Breen v. District Court et al.*, 106.

Water Rights—Injunction—Jurisdiction—Due Process of Law.

3. *Held*, on *certiorari*, that the district court exceeded its jurisdiction in making an order, in a summary proceeding and with notice of less than twenty-four hours, which to all intents and purposes enjoined a person from interfering with certain water rights theretofore adjudged between various claimants in an action to which the person so enjoined was not a party; that, if a trespasser, injunction against him could only be had after a hearing in a regular action; and that the adjudication of his rights as made by the order was without due process of law.—*State ex rel. Pew v. District Court et al.*, 233.

Probate Courts—Executors—Objections to Final Accounts.

4. *Certiorari* does not lie to review the action of the district court, while sitting in probate, in granting a motion to strike out objections to the final account of an executrix and to a petition for distribution of the estate.—State ex rel. Cotter et al. v. District Court et al., 303.

Probate Proceedings—Order Appointing Attorney for Minors—Vacation.

5. *Certiorari* is not the proper remedy to review an order of the district court made in probate proceedings, vacating an order, theretofore made, appointing an attorney for minor heirs.—State ex rel. Cotter et al. v. District Court et al., 306.

Discretion—Abuse.

6. An abuse of judicial discretion is not to act without jurisdiction or in excess of it, so as to make it reviewable on *certiorari*.—State ex rel. Cotter et al. v. District Court et al., 306.

Probate Courts—Order of Sale—Real Property—Staying Execution.

7. The district court, sitting in probate, made an order of sale of certain real property to satisfy claims of creditors of the estate. Subsequently one of the devisees filed a petition that the property specifically devised to him be distributed to him. The court thereupon made an order requiring all persons interested in the estate to appear and show cause why the order prayed for should not be made, upon the execution by petitioner of an undertaking conditioned to pay his proportion of the debts of the estate, and directed the executor to postpone the sale until after hearing of the petition. *Held*, on *certiorari*, that the court had jurisdiction of the matter, and in determining it, to inquire into the condition of the estate and see whether a necessity for the sale still existed, and make its order accordingly, and that therefore the writ will not lie.—State ex rel. Pauwelyn v. District Court et al., 345.

CHANGE OF VENUE.

Liability for costs incident to. See Counties, 1, 2.

CHECKS.**Principal and Agent—Sales—Payment.**

1. While an agent authorized to receive payment of money should accept cash only, yet where one employed to sell cattle, accepted as part payment a check payable to the order of the principal, indorsed it for collection and subsequently cashed it and placed the money in bank to the credit of his principal, the latter cannot complain, and it is immaterial that the check, made payable to the principal, had been indorsed in his name for collection by the agent without special authority to that effect, inasmuch as the principal actually received the money.—Case et al. v. Kramer, 142.

CITIES AND TOWNS.

See Municipal Corporations.

CLAIM AND DELIVERY.**Measure of Damages—Instructions.**

1. To instruct the jury, in an action in claim and delivery to recover possession of horses, wagons, etc., with damages for the wrongful detention of the same, that the measure of damages in such a case is "the value of the use of the property taken, from the time of the taking of the same up to the present time," is error, since it fails to

submit to the jury the proposition that from the gross earnings of the property in controversy the expense of feeding and taking care of it must be deducted, actual damages being all that may be recovered.—*Haggerty Bros. v. Lash & Shaughnessy*, 517.

Damages—Burden of Proof.

2. In an action in claim and delivery to recover the possession of horses, wagons, etc., plaintiff's title to which was denied and damages asked by defendants for a wrongful taking of the property by plaintiff, an instruction requested by the latter, that "a party who claims compensation for an alleged wrong done must show not only that he has suffered a loss on account of the injury, but also what was the amount of the loss, and the burden of proving these things is upon the party alleging the wrong," correctly stated the law, was applicable to the issues made and should have been given.—*Haggerty Bros. v. Lash & Shaughnessy*, 517.

Appeal—Disposition of Cause.

3. Where, in an action in claim and delivery, the issue of ownership was correctly determined, but instructions going to the question of damages claimed for the wrongful detention of the property in controversy were erroneously given and refused, the cause will be remanded for a new trial of the issue of damages only, and, after a determination of their amount, the judgment ordered modified accordingly.—*Haggerty Bros. v. Lash & Shaughnessy*, 517.

Instructions—Assumption of Facts—Mortgages—Transfer—Notice.

4. Instructions requested by defendants in an action in claim and delivery, that unless one of the defendants, as assignee of a chattel mortgage, had notice or knowledge of a prior mortgage to plaintiff's assignor, the verdict should be for defendants, and that the burden of proof is on the plaintiff to establish the fact that such defendant had notice of the prior mortgage, contained an assumption that the defendant had paid value therefor, a fact directly in issue, and were properly refused by the court.—*Lindsley v. McGrath*, 564.

Evidence—Appeal—Harmless Error.

5. Where, in an action in claim and delivery, the mortgagor of the chattels in controversy, called to testify in behalf of plaintiff, on her examination in chief was asked whether she had not made a statement that a mortgage had been made by her on the property, but that it would be released by the mortgagees at the time she asked them to do so, and she answered in the negative, any error committed in permitting the question to be answered, if error, was harmless.—*Lindsley v. McGrath*, 564.

Principal and Agent—Power of Attorney—When Authority Conferred may not be Questioned.

6. Where one, claiming to act for another, had taken possession of personal property under a mortgage held by his principal, and, under a writing giving him power to do any and all things necessary in the premises, but which failed to state what the premises were, had transferred for value the mortgage and a note secured by it, one of the defendants in an action in claim and delivery, who claimed no interest whatever in the chattels in controversy but had acted as agent of his codefendant in the taking of them, could not complain that the attorney in fact of the original holder of the mortgage had acted without or in excess of his authority under his power, or that the writing was void for uncertainty.—*Lindsley v. McGrath*, 564.

CONDEMNATION PROCEEDINGS.

See Eminent Domain.

CONFESSIONS.

See Malicious Prosecution, 8.

CONSIDERATION.

See Conversion, 2, 4, 5; Evidence, 39.

CONSPIRACY.

See Criminal Law, 51, 52, 53, 54, 55.

CONSTITUTION.

Criminal Law—Evidence—Waiver—Comparison of Shoes with Footprints—Admissibility—Guaranties.

1. Where, on a trial for murder, defendant consented to the taking of his shoes for the purpose of comparison with footprints, leading from the place of the homicide, he waived the right to object to the use of such evidence against him on the ground that the Constitution, Article III, section 18, forbids its use when it declares that no person shall be compelled to testify against himself in a criminal proceeding.—State v. Fuller, 12.

Criminal Law—Evidence—Constitutional Guaranties.

2. *Obiter*: Evidence obtained by the taking of the shoes of defendant, charged with murder, against his consent, and comparing them with footprints leading from the place of the crime, is admissible, and its use does not deprive him of the constitutional guaranties prohibiting unreasonable searches and seizures (Const., Art. III, sec. 7), and declaring that no person shall be compelled to testify against himself in a criminal proceeding (sec. 18.)—State v. Fuller, 12.

Telephones—Construction and Maintenance—Self-executing Provisions.

3. Section 14, Article XV of the Constitution, granting to any person or corporation the right to construct or maintain telegraph and telephone lines within this state, and providing that the legislature shall by general law enact reasonable regulations to give full effect to such grant, is not self-executing.—State ex rel. Crumb v. City of Helena et al., 67.

Telephones—Poles and Fixtures—Highways—Obstruction.

4. In the absence of legislation making the grant contained in section 14, Article XV of the Constitution, relative to the right of any person to construct and maintain telegraph and telephone lines within this state, effective, the placing of poles and other fixtures, necessary for such business, in the public highways would constitute an unlawful obstruction thereof.—State ex rel. Crumb v. City of Helena et al., 67.

Telephones—Construction—Highways—Statutes.

5. Any Act placed upon the statute books in obedience to the command of the Constitution (Article XV, section 14), that such reasonable regulations shall be provided by law as to give full effect to the grant contained in said instrument conferring the right to place poles and other fixtures, necessary for the carrying on of a telegraph or telephone business in the public highways, upon any person or corporation wishing to engage in it, must not only be a general one of uniform operation, but one which will give full, not partial, effect

to such constitutional grant.—*State ex rel. Crumb v. City of Helena et al.*, 67.

Telephones—Construction—Municipal Corporations—Highways—Statutes.

6. *Held*, that chapter 55 of the Session Laws of 1905 (Laws of 1905, p. 122), authorizing any person or corporation desirous of engaging in the telegraph, telephone, electric light or power business, to construct the necessary poles and appliances along and upon any of the public highways, but adding that "the provisions of this Act shall not apply to public roads and highways within the limits of incorporated cities or towns," is, as to this proviso, invalid, in that by its insertion the carrying on of such business would practically be confined to country districts, contrary to the purpose of the constitutional grant (Article XV, section 14) with respect to this subject.—*State ex rel. Crumb v. City of Helena et al.*, 67.

Telephones—Construction and Maintenance—Regulation—Cities and Towns.

7. *Obiter*: After the legislature has complied with the constitutional mandate to provide by general law such reasonable regulations as will give full effect to the grant authorizing the construction and maintenance of telegraph and telephone lines within the state (Constitution, Article XV, section 14), it may empower cities and towns to enact such reasonable regulations for the conduct of such business as may be considered necessary.—*State ex rel. Crumb v. City of Helena et al.*, 67.

Statutes—Title—State and County Boards of Health.

8. Sections 11, 25 and 26 of House Bill No. 104 (Laws 1901, p. 80), the purpose of which Act, as expressed in the title, was to form a state board of health, define its powers and duties and provide for the compensation of its officers and for the enforcement of its rules, while the body of the statute, among other things, confers upon county boards of health power to declare quarantine against contagious diseases and confine persons affected with such diseases in suitable detention hospitals, power for the erection of which is also granted, are unconstitutional as in contravention of Article V, section 23, of the Constitution, which declares that no bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in its title.—*Yegen v. Board of County Commissioners et al.*, 79.

Statutes—Review.

9. In construing legislation the supreme court will not inquire whether it is good or bad, moral or immoral in its tendencies, the legislature being the exclusive judge, within the limitations of the Constitution, as to the advisability of enacting a particular bill into law, and its judgment and discretion in the performance of its duties may not be reviewed by the courts.—*Yegen v. Board of County Commissioners et al.*, 79.

Enactment of Statutes—Limitations.

10. Under Constitution, Article V, section 24, requiring, among other things, that no bill shall become a law unless the names of the members in each House voting be entered on the journal, the Act of March 11, 1901 (Laws 1901, p. 157), relating to "the limitation of time within which actions may be brought," did not become a law, it appearing from the journal of the Senate that the names of the members of that branch of the Seventh Legislative Assembly voting on the measure were not entered on the journal.—*Palatine Insurance Co. v. Northern Pac. Ry. Co.*, 268.

Enactment of Statutes—Evidence.

11. The journal of either House of the legislature imports verity, and may be looked to to determine whether or not a bill, valid on its face, signed by the presiding officer of each House, approved by the governor and deposited in the office of the Secretary of State, was in fact passed in compliance with the requirements of section 24, Article V of the Constitution.—*Palatine Insurance Co. v. Northern Pac. Ry. Co.*, 268.

Statutes—Amendment by Title.

12. *Held*, that section 524 of the Code of Civil Procedure, being Act of 1893, approved March 9, relating to limitation of time within which certain actions must be brought, made a part of the Codes of 1895 by section 5186, was not an amendment of the Act of 1893, but recognized as the law of the land by the legislature and simply continued in force as such, and that therefore section 25, Article V of the Constitution providing that no bill shall be amended by title only has no application.—*Palatine Insurance Co. v. Northern Pac. Ry. Co.*, 268.

Statutes—Title—Penalty Clause.

13. A penalty clause may be incorporated in an Act without being designated in its title, and such provision is not in violation of the constitutional inhibition (Constitution, Art. V, sec. 23) that no bill containing more than one subject shall become a law, which subject shall be clearly expressed in the title of the bill.—*In re Terrett*, 325.

Bounties—Validity—Title.

14. Act of March 6, 1903 (Laws 1903, p. 166), amendatory of sections 3070-3073 of the Political Code relative to bounties on certain stock-destroying animals, and which sought to amend section 1124 of the Penal Code, also referring to bounties, but theretofore repealed (Laws 1897, p. 249), while of no effect as to the attempted amendment of repealed section 1124, is valid and not unconstitutional, for the alleged reason that its title contains more than one subject.—*In re Terrett*, 325.

Bounty Inspectors—Appointment—District Judges.

15. Since bounty inspectors, provision for whose appointment is made in Act of March 6, 1903 (Laws 1903, p. 166), are not officers whose appointment is "otherwise provided for" in the Constitution (Const., Art. VII, sec. 7), the legislature had the power to delegate the selection of three stockgrowers in each county to appoint bounty inspectors, to the district judges.—*In re Terrett*, 325.

Banks—Assessment—Statutes.

16. That portion of subdivision 8 of section 3695, Political Code, granting to private bankers the right to deduct their deposits (debts) from moneys on hand, for purposes of assessment, is in violation of Article XII, sections 11 and 16, providing, respectively, that taxes "shall be uniform upon the same class of subjects," and that "all property shall be assessed in the manner prescribed by law," etc.—*Clark et al. v. Maher et al.*, 391.

Amendments—District Courts—Judicial Notice—Evidence.

17. While, as a general rule, a court may take testimony to refresh its memory on matters of which it is required to take judicial notice, it should not do so,—on motion to quash an alternative writ of mandate,—for the purpose of informing itself of the regularity of the adoption of a constitutional amendment, where by reason of a proclamation of the governor declaring the amendment to have been adopted, the amendment was *prima facie* a law, of which fact the

court was sufficiently informed.—*State ex rel. Teague v. Board of Commissioners et al.*, 426.

Amendments—County Commissioners—Regularity of Adoption—Pleading and Practice—Mandamus.

18. After the amendment to the Constitution relative to the election and tenure of county commissioners (*Session Laws*, 1901, p. 208) had been declared regularly adopted by proclamation of the governor, it thus becoming *prima facie* a law of which courts took judicial notice, it was incumbent upon relator in a proceeding in *mandamus*, in which the regularity of the adoption of the amendment was attacked, to plead facts showing a noncompliance with the provisions of the Constitution which prescribe the mode to be pursued in amending that instrument; and for failure to so plead, and in the absence of an offer to amend, the court properly sustained a motion to quash.—*State ex rel. Teague v. Board of Commissioners et al.*, 426.

Separate Amendments—Manner of Submission.

19. *Held*, that the amendment to Article XVI, section 4 of the Constitution, changing the term of county commissioners from four years to six years, extending the tenure of the then incumbents, and giving district judges power to fill vacancies on the board, is not violative of section 9, Article XIX of the Constitution, providing that separate amendments must be prepared and distinguished by numbers, or otherwise, so that they may be voted upon separately, but must be considered as one scheme, with the single purpose of establishing and maintaining in existence a board, two of whom at all times are experienced men.—*State ex rel. Teague v. Board of Commissioners et al.*, 426.

Amendments—County Commissioners—Extending Official Tenure.

20. The amendment to Article XVI, section 4 of the Constitution, changing the tenure of county commissioners from four years to six years, and extending the tenure of the then incumbents, is not violative of Article V, section 31 of that instrument, providing that no law shall extend the term of office of any public officer after his election, the term "law" as used in that section having reference to legislative enactments only.—*State ex rel. Teague v. Board of Commissioners et al.*, 426.

Amendments—Eight-hour Law—Regularity of Adoption—Review.

21. In construing Chapter 50, page 105, *Laws of 1905*, enacting the "eight-hour law," the question whether the amendment to the state Constitution relative to the subject, adopted by popular vote at the election of 1904, had been properly submitted, is immaterial, since the validity of the statute must be determined with reference to the Fourteenth Amendment to the federal Constitution, irrespective of whether or not the amendment to the state Constitution authorizes its enactment.—*State v. Livingston C. B. & M. Co.*, 570.

Eight-hour Law—Right to Perform Labor for State—Freedom to Contract.

22. One who contracted with a city to lay a concrete sidewalk, and who was informed against and convicted for a violation of the provisions of Chapter 50, page 105, of the *Laws of 1905*, prescribing that eight hours should constitute a day's labor on all public works, cannot complain that the statute abridges his freedom to contract, since no one is entitled, as a matter of absolute right, to perform labor for the state or any of its subdivisions, and it is within the power of the state to prescribe under what conditions work may be performed for it or its municipalities.—*State v. Livingston C. B. & M. Co.*, 570.

Equal Protection of Laws—Eight-hour Law.

23. The "eight-hour law" (Chapter 50, Laws of 1905, page 105) is not obnoxious to the constitutional provision, guaranteeing to all the equal protection of the laws, because the rule of conduct therein prescribed applies alike to all who contract to do work for the state or any of its subdivisions, and alike to all employed to perform labor on such work.—*State v. Livingston C. B. & M. Co.*, 570.

Eight-hour Law—Mines—Smelters and Mills—Police Power.

24. *Held*, that the provisions of Chapter 50, Laws of 1905, page 105, limiting the hours of labor of employees in underground mines and in mills and smelters for the reduction of ores to eight hours a day, constitute a valid exercise of the police power of the state and are not obnoxious to constitutional provisions.—*State v. Livingston C. B. & M. Co.*, 570.

Eight-hour Law—Private Contracts—State may not Interfere.

25. The right of persons engaged in private business to enter into contracts for labor with relation to such business is protected by the Fourteenth Amendment to the federal Constitution, and the state may not interfere.—*State v. Livingston C. B. & M. Co.*, 570.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article III, section 7	18
Article III, section 16.....	50
Article III, section 18.....	18
Article V, section 23.....	83, 331
Article V, section 24.....	273
Article V, section 31.....	430
Article VII, section 7	333
Article XII, section 11.....	400
Article XII, section 16.....	400
Article XV, section 11.....	388
Article XV, section 14.....	71 <i>et seq.</i>
Article XIX, section 9	428, 431

CONTEMPT.***Certiorari*—Judgment—Record—Sufficiency.**

1. Under Code of Civil Procedure, section 2172, an order declaring a person guilty of a direct contempt must recite the facts upon which the conclusion that the contemnor is guilty is based. The district court in an order adjudging an attorney at law guilty of such contempt merely recited that while the court was in session, the contemnor addressed it in an insolent manner and contemptuously attempted to call the presiding judge as a witness to prove certain scandalous matter. *Held*, on *certiorari*, that the order—the record of the case—was insufficient to meet the requirements of section 2172 *supra*.—*State ex rel. Breen v. District Court et al.*, 106.

***Certiorari*—Record.**

2. On *certiorari* to review an order of the district court adjudging one guilty of a direct contempt, the supreme court may not look beyond the order adjudging the contemnor guilty—which constitutes the record of the case (Code Civ. Proc., sec., 2172)—to determine from the facts whether or not the judgment was proper.—*State ex rel. Breen v. District Court et al.*, 106.

Water Rights—District Courts.

3. The proper way for a district court to enforce its order theretofore made adjusting water rights between claimants entitled thereto is by contempt proceedings, upon the filing of an affidavit showing a disregard of the order.—*State ex rel. Pew v. District Court et al.*, 233.

Certiorari—Water Rights—Injunction—Judicial Districts—Jurisdiction.

4. Certain water rights were adjudicated between the various claimants and an injunction issued restraining all parties to the action from interfering with each other's rights, in Meagher county, attached to the sixth judicial district. Subsequently that part of this county wherein the waters in controversy in that cause were situate was added to Broadwater county, a portion of the ninth judicial district. For a violation of the injunctive portion of the decree above mentioned the relators were punished for contempt by the district court of the ninth district. *Held*, on *certiorari*, that the court had jurisdiction of the contempt proceedings and could do all things to enforce the decree that its predecessor, the district court of the sixth district, might have done had the change in districts not been made.—*State ex rel. Pool et al. v. District Court et al.*, 258.

Water Rights—Injunction—Parties.

5. *Quære*: May a person, who was not a party to a water right suit in which an injunction was issued, but who occupies the relation of a privy to one of the parties whose rights were adjudicated, be held to obey the mandate of the court which runs only to the parties directly interested and not to their successors and assigns, and where he may be unaware of the existence of such injunction?—*State ex rel. Pool et al. v. District Court et al.*, 258.

Injunction—Water Rights—Parties.

6. Where a decree, entered in a suit to determine water rights, in terms only enjoins the parties directly interested from interfering with the rights of each other as adjusted between them, a successor in interest to the rights of one of the parties, who at one time asserted the benefits of the injunctive feature of the decree as against the other parties to it, and again willfully and knowingly disregarded the provisions of it, made himself, by such conduct, to all intents and purposes a party to it and may be held liable in contempt for a violation of it.—*State ex rel. Pool et al. v. District Court et al.*, 258.

CONTINUANCE.

See Trial, 4, 5, 6.

CONTRACTS.

See, also, Eight-hour Law, 7, 10; Sales.

Rescission—Estoppel.

1. Where certain bonds purchased by plaintiff specifically provided that the entire contract was therein set forth; that no one had authority to alter, change or modify the same in any manner; and that defendant company issuing the bonds was not to be bound by any statement, promise or agreement not therein contained, made by any person—plaintiff, by retaining the bonds, making monthly payments thereon for more than a year after the date of their receipt, and further obtaining permission from defendant to act as its agent in the same capacity as that in which another agent was acting at the time plaintiff entered into the contract, was thereby estopped from rescinding the contract on the ground that he was misled to his prejudice by any

representations made by such other agent or by any circular given him by the latter or mailed to him by the company before or after receiving the bonds.—*Grindrod v. Anglo-Am. Bond Co.*, 169.

Rescission—Fraud—Reliance on Representations.

2. Where it appears that plaintiff in an action to rescind a contract, into which he alleged he was induced to enter by false and fraudulent representations made to him by defendant, had investigated for himself or had the means at hand to ascertain the truth or falsity of any representations made to him, his reliance upon such representations, however false they may have been, affords no ground of complaint.—*Grindrod v. Anglo-Am. Bond Co.*, 169.

Breach—Evidence—Sufficiency.

3. Evidence examined, and *held* insufficient to sustain a cause of action for the breach of the conditions of a contract for the purchase of certain cumulative bonds.—*Grindrod v. Anglo-Am. Bond Co.*, 169.

Brokers—Pleadings—Proof.

4. Though a contract authorizing a broker to sell real estate must be in writing and subscribed by the party to be charged or his agent (Civil Code, sec. 2185, subsec. 6), the fact that it is in writing is a matter of proof and not of allegation in pleading.—*Blankenship et al. v. Decker et al.*, 292.

Express—Quantum Meruit.

5. *Obiter*: Upon the complete performance of an express contract for services at a stipulated compensation, a recovery may be had upon a *quantum meruit*.—*Blankenship et al. v. Decker et al.*, 292.

Brokers—Quantum Meruit—Demurrer—Harmless Error.

6. Where, in an action to recover for services alleged to have been performed as brokers to sell real estate, plaintiffs at the opening of the trial abandoned a count in their complaint based upon a *quantum meruit*, introduced no proof in support of it, and the trial proceeded upon the issues presented by the answer to a count based on a written contract, and the instructions of the court were formulated accordingly, the error of the court in overruling a special demurrer to the count based upon the *quantum meruit*, if error, was harmless.—*Blankenship et al. v. Decker et al.*, 292.

Brokers—Construction—Instructions—Burden of Proof.

7. Where the attendant facts and circumstances in the making of an agreement are resorted to as an aid to an understanding of it, no greater burden rests upon the promisor than to show by a preponderance of the evidence that the promisee understood it as he (the promisor) believed he understood it (Civil Code, sec. 2214); and instructions, submitted in an action to recover for services as brokers to sell real estate which advised the jury that plaintiffs' (promisees') right of recovery depended upon whether they understood the contract in question in a certain way, laid down an erroneous rule of law.—*Blankenship et al. v. Decker et al.*, 292.

Brokers—Uncertainty—Presumptions—Instructions.

8. While, under section 2219, Civil Code, in the absence of proof the presumption will be indulged that the promisor caused any ambiguity or uncertainty in the terms of a written contract, yet where the evidence introduced permits the inference that the promisee wrote the agreement and himself selected the terms employed therein, this presumption gives way to the contrary one that the latter caused the uncertainty, and the burden rests upon him to remove it; and the district court, in an action to recover for services alleged to have been rendered as brokers to sell real estate, should have given ap-

pellants' (promisors') requested instruction embodying this principle, where the evidence tended to prove that one of them went to plaintiffs' office and procured a member of the brokerage firm to write a memorandum agreement, composing it himself, but following the client's wishes.—*Blankenship et al. v. Decker et al.*, 292.

CONTRIBUTORY NEGLIGENCE.

See Personal Injuries.

CONVERSION.

See, also, Evidence, 38.

Damages—Evidence—Sufficiency—Appeal.

1. Where, in an action for damages for the conversion of personal property by a constable, the evidence, though conflicting as to the amount of damages sustained, would have warranted the jury in finding a much larger amount in favor of plaintiff than it did, the contention of defendant on appeal that the evidence was insufficient to sustain the verdict is without merit.—*Borden v. Lynch*, 503.

Evidence—Fraud—Notes—Mortgages—Consideration—Appeal.

2. Where, in an action in conversion there was no substantial evidence adduced tending to show that a note, and a mortgage given on the personal property in controversy to secure the former instrument had their inception in fraud and were not based on a consideration, although there were some inconsistencies as to the question of consideration, the verdict in favor of plaintiff will not be disturbed on appeal.—*Borden v. Lynch*, 503.

Evidence—Mortgages—Fraud—Offer of Proof—Scope.

3. In an action by a chattel mortgagee to recover for the conversion of the property by an officer who had levied thereon, defendant offered to prove by the attaching creditor that the mortgagor had told him shortly before the execution of the mortgage that she intended to execute it to prevent her other creditors from levying on her property. *Held*, that such offer was properly rejected for failure to include a tender of proof that plaintiff was cognizant of the fraudulent intent of the mortgagor in encumbering her property or had aided in its accomplishment.—*Borden v. Lynch*, 503.

Notes—Mortgages—Consideration—Burden of Proof—Instructions.

4. An instruction, given in an action to recover damages for the conversion of certain personal property seized by defendant constable, that a note secured by a mortgage imported a valuable consideration, and that the burden of showing the want of consideration rested upon the party seeking to invalidate it, correctly stated the law, even though the mortgage was given to secure an antecedent debt.—*Borden v. Lynch*, 503.

Mortgages—Fraud—Insolvency—Instructions.

5. The fact that a chattel mortgagor was insolvent at the time she executed a mortgage on property in controversy in an action for damages for conversion did not of itself render the transaction fraudulent and void as against an attaching creditor, since an insolvent person may lawfully pledge his property to obtain loans or to secure an antecedent debt; and an instruction telling the jury, in substance, that, if they found that the mortgage was supported by a valid consideration and given in good faith to secure a debt actually due, the

fact that the mortgagor was insolvent at the time she gave the mortgage was not presumptive proof of its fraudulent character, was correct.—*Borden v. Lynch*, 503.

COUNTERCLAIMS.

See *Eminent Domain*, 11.

COUNTIES.

Attorneys—Change of Venue—Liability for Costs—Mandamus.

1. Where a criminal cause is removed from one county to another for trial, it is the duty of the county to which it is transferred to furnish a prosecuting officer, and if for any reason its county attorney is unable to act as such officer in the trial of the cause and the court appoints special counsel to represent the state, the cost incident to his employment is not a proper charge against the county from which the change of venue was had, and therefore *mandamus* will not issue to compel its payment by that county.—*State ex rel. Cascade County v. Lewis and Clark County et al.*, 351.

Change of Venue—Costs—Certification by Judge—Effect.

2. The mere certification of the costs resulting from the removal of a cause for trial from one county to another, required to be made by the trial judge under Political Code, section 4683, to the board of county commissioners of the county where the trial was had, may not be said to have the force and effect of a judgment against the county from which the cause was transferred, where no action was pending to which it was a party.—*State ex rel. Cascade County v. Lewis and Clark County et al.*, 351.

COUNTY ATTORNEYS.

See *Attorneys*, 2, 3, 6, 7, 8.

COUNTY BOARDS OF HEALTH.

See *County Commissioners*, 1, 2, 3, 4, 5.

COUNTY COMMISSIONERS.

See, also, *Constitution*, 18, 19, 20.

Powers—Erection of Detention Hospital.

1. A statute which empowers the board of county commissioners to erect a detention hospital, but fails to authorize it in express terms to acquire a site for such building, impliedly grants such power, since every power necessary for the execution of a power expressly granted is implied.—*Yegen v. Board of County Commissioners et al.*, 79.

Constitution—Statutes—Title—State and County Boards of Health.

2. Sections 11, 25 and 26 of House Bill No. 104 (*Laws 1901*, p. 80), the purpose of which Act, as expressed in the title, was to form a state board of health, define its powers and duties and provide for the compensation of its officers and for the enforcement of its rules, while the body of the statute, among other things, confers upon county boards of health power to declare quarantine against contagious diseases and confine persons affected with such diseases in suitable detention hospitals, power for the erection of which is also granted, are unconstitutional as in contravention of Article V, section 23, of the Constitution, which declares that no bill shall be passed by the legislature containing more than one subject, which shall be clearly

expressed in its title.—*Yegen v. Board of County Commissioners et al.*, 79.

Powers—Detention Hospitals—Statutes.

3. Under Political Code, section 4230, the board of county commissioners has not the power to erect and maintain a detention hospital for persons affected with contagious or pestilential diseases, at the expense of the county, subsection 7 thereof, which confers authority to provide “necessary county buildings,” referring simply to such buildings as may be required for ordinary county purposes, and subsection 9, under which a hospital may be constructed, having reference to a hospital for the indigent sick.—*Yegen v. Board of County Commissioners et al.*, 79.

County Boards of Health—Powers—Real Estate—Purchase.

4. The power given to the county board of health, consisting of the county commissioners and one physician, under Political Code, section 2864, to pay out of the general fund of the county the necessary expenses attendant upon the enforcement of the chapter relating to such boards of health, does not include authority to the board of county commissioners to acquire land on their own motion and to erect buildings thereon.—*Yegen v. Board of County Commissioners et al.*, 79.

County Boards of Health—Status.

5. The board of county commissioners and the county board of health, consisting of the commissioners and one physician (Political Code, sec. 2860), are two bodies with distinct and separate powers.—*Yegen v. Board of County Commissioners et al.*, 79.

COUNTY TREASURERS.

See Licenses, 1, 2, 3.

CRIMINAL LAW.

New Trial—Appeal—Bill of Exceptions.

1. Under section 2, Chapter XXXIV, p. 48, Session Laws of 1903, the only manner of reviewing an order granting or refusing a new trial in a criminal case is upon a bill of exceptions incorporating the matters upon which it is based.—*State v. Kremer*, 6.

Bill of Exceptions—Settlement—Notice—Statutes.

2. *Held*, that the provisions of section 2171 of the Penal Code, and of section 1 of Chapter XXXIV, page 47, Session Laws of 1903, relating to the settlement of bills of exceptions in criminal cases, and providing that the draft of a proposed bill must be presented, upon at least two days' notice to the adverse party, to the judge for settlement or delivered to the clerk for the judge, are mandatory; that the giving of such notice is an indispensable prerequisite to the consideration of the bill by the supreme court, and that the record must show affirmatively the fact of the giving of such notice.—*State v. Kremer*, 6.

Bill of Exceptions—Delivery of Copy to Adverse Party—Notice.

3. Delivery of a copy of a proposed bill of exceptions to the county attorney, in a criminal case, does not meet the requirements of Penal Code, section 2171, and section 1, Chapter XXXIV, Laws of 1903, page 47, relative to notice of at least two days to the adverse party prior to delivery of such bill to the judge for settlement.—*State v. Kremer*, 6.

Grand Larceny—Trial—Instructions—Appeal.

4. In a prosecution for larceny, an instruction that, if it was possible for the jury upon the evidence to account for the taking of the prop-

erty mentioned, upon any reasonable hypothesis other than the guilt of defendant, they should do so, and find the defendant not guilty, cannot be said to be appropriate to every case, and, where the evidence is not before the supreme court on appeal, the refusal of the trial court to give such instruction will not be reviewed.—*State v. Kremer*, 6.

Instructions—Jury.

5. A requested instruction in a criminal prosecution that the jury should not consider their personal opinions as to the facts proven, and that they might believe as men that certain facts exist, but as jurors they could only act upon the evidence introduced upon the trial, and from that and that alone they should form their verdict, unaided, unassisted and uninfluenced by any opinion or presumption not framed upon the testimony, was properly refused.—*State v. Kremer*, 6.

Larceny—Instructions—Reasonable Doubt.

7. The refusal of the trial court, in a prosecution for larceny, to give a requested instruction to the effect that the state must prove every material allegation of the information beyond a reasonable doubt, did not constitute error where the same subject had been covered by numerous instructions given by the court though in different language from that found in the offered instruction.—*State v. Kremer*, 6.

Homicide—Cross-examination—Exclusion of Evidence—Harmless Error.

8. While the interest and feeling exhibited by a witness are material elements to be weighed by the jury in determining his credibility, yet, where in a prosecution for murder, a witness for the state had testified on cross-examination that he had not told the county attorney that he wanted to testify but that he "just went up there and told him"—thus making his interest in the case apparent to the jury—the exclusion of a further question whether he had sent anyone else to tell the county attorney of his desire to testify, though technically erroneous as an undue restriction of the cross-examination, was without prejudice.—*State v. Fuller*, 12.

Homicide—Evidence—Refusal to Strike Out—Error Cured.

9. Where the trial court, in a prosecution for murder, at first refused to strike out certain hearsay testimony, but subsequently ordered it stricken, and admonished the jury, both orally and in an instruction, not to consider it in making up their verdict, the prior erroneous ruling was fully cured and defendant cannot be heard to complain.—*State v. Fuller*, 12.

Homicide—Evidence—Waiver—Comparison of Shoes with Footprints—Admissibility—Constitutional Guaranties.

10. Where, on a trial for murder, defendant consented to the taking of his shoes for the purpose of comparison with footprints, leading from the place of the homicide, he waived the right to object to the use of such evidence against him on the ground that the Constitution, Article III, section 18, forbids its use when it declares that no person shall be compelled to testify against himself in a criminal proceeding.—*State v. Fuller*, 12.

Homicide—Evidence—Footprints—Admissibility.

11. *Obiter*: Evidence obtained by the taking of the shoes of defendant, charged with murder, against his consent, and comparing them with footprints leading from the place of the crime, is admissible, and its use does not deprive him of the constitutional guaranties prohibiting unreasonable searches and seizures (Const., Art. III, sec. 7), and declaring that no person shall be compelled to testify against himself in a criminal proceeding (sec. 18).—*State v. Fuller*, 12.

Homicide—Trial—District Courts—Commenting on Evidence.

12. Where, in a prosecution for murder, the trial court casually remarked, when a transcript of the evidence taken at the coroner's inquest was offered in defendant's behalf for impeachment purposes, that it was admitted for "what it was worth," such remark was not prejudicial to the defendant as a comment upon the weight of the evidence so offered.—State v. Fuller, 12.

Homicide—Instructions—Defining Malice.

13. A definition of "malice" in an instruction, not precisely conforming to Penal Code, section 7, but nevertheless sufficiently comprehensive to give the jury a definite idea of the meaning of the word, was not a cause for reversal, in the absence of a request for a more specific instruction.—State v. Fuller, 12.

Homicide—Instructions—"Heat of Passion"—Harmless Error.

14. Alleged error in an instruction in defining the expression "heat of passion" was harmless, where the jury found defendant guilty of murder in the first degree, and where the evidence did not tend to show a case of manslaughter.—State v. Fuller, 12.

Homicide—Instructions—Credibility of Witnesses—Harmless Error.

15. An instruction, in a prosecution for murder, which informed the jury that if they found that any witness had willfully and deliberately testified falsely as to any material fact in the case, they were at liberty to disregard his entire testimony, while in a subsequent sentence in the same paragraph the law was stated correctly: that such testimony could only be ignored in case no other corroborative evidence entitled to credit had been produced—though conflicting and erroneous, was not cause for reversal where it was not apparent that the jury were misled and where the verdict of guilty was obviously correct.—State v. Fuller, 12.

Homicide—Failure of Defendant to Testify—Instructions.

16. In a prosecution for murder, where the defendant had not been sworn as a witness, it was proper for the court, if it saw fit so to do, to instruct the jury that the defendant in a criminal proceeding cannot be compelled to be a witness against himself, and that if he does not testify this fact must not be used to his prejudice.—State v. Fuller, 12.

Homicide—Information—Form—Misspelling—"Deliberately."

16a. Held, under Penal Code, sections 1842 and 2600, that an information alleging that defendant feloniously, willfully and of his (defendant's) "*deliberately*" premeditated malice aforethought, committed the homicide in question, was not fatally defective because of the mere misspelling of the word "*deliberately*."—State v. Lu Sing, 31.

Homicide—Information—Sufficiency—Appeal.

17. The question of the sufficiency of an information charging homicide may be raised for the first time in the appellate court.—State v. Lu Sing, 31.

Homicide—Information—Sufficiency.

18. To support a judgment of conviction of murder of the first degree, it is not necessary that the information should allege that the acts which resulted in the homicide were done deliberately, the allegations sufficient for a common-law indictment sufficing for an information in this regard.—State v. Lu Sing, 31.

Homicide—Witnesses—Competency—Chinaman—Ability to Tell Nature of Oath.

19. A Chinaman who, upon being tested as to his competency as a witness, stated that he could tell what he knew and that what he would say would be the truth, but that he did not know the nature of an oath, was qualified to testify under Code of Civil Procedure, section 3161, he not falling within the exceptions noted in section 3162, as amended (Laws 1897, p. 245), or those mentioned in section 3163 of the same code—*State v. Lu Sing*, 31.

Homicide—Evidence—Admission—Competency.

20. Where, in a prosecution for murder, the peace officer who took the defendant, a Chinaman, into custody, testified that on his way to jail the latter attempted to converse with him, but that he only understood a portion of what he said, reciting the part so understood by him, it was not error for the trial court to refuse to strike out all of the witness' testimony relative to the conversation on an objection that, since he had not understood all he should not be permitted to testify to a portion only, it appearing that the court had properly cautioned the jury as to the weight to be given by them to this character of evidence.—*State v. Lu Sing*, 31.

Homicide—Objections to Evidence—Form.

21. An objection to questions asked defendant, charged with murder, on cross-examination that the evidence sought was "incompetent, irrelevant, immaterial and not cross-examination" was too general, where it was apparent that the evidence sought was material.—*State v. Lu Sing*, 31.

Homicide—Instructions—Commenting on Evidence.

21a. An instruction requested by defendant, accused of homicide, that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, "affords a strong presumption of innocence," was properly refused, it being misleading and an invasion of the province of the jury.—*State v. Lu Sing*, 31.

Homicide—Verdict—Time for Pronouncing Sentence—Statutes.

22. A verdict of guilty of murder of the first degree was returned on November 10, 1905. On the day following judgment was pronounced, over objection of the defendant that under section 2210 of the Penal Code he was entitled to two full days after the rendition of the verdict, before sentence. *Held*, that the court may not pronounce judgment before the expiration of two days after rendition of the verdict, provided the term of court lasts that long; otherwise the time of pronouncing judgment must be postponed to a date as remote as can reasonably be fixed within the current term of court. *State v. Lu Sing*, 31.

Homicide—Time for Pronouncing Sentence—Presumptions.

23. When two days did not intervene between the rendition of a verdict of guilty in a capital case, and the pronouncement of judgment (Penal Code, sec. 2210), it will be presumed on appeal, in the absence of anything in the record to the contrary, that the court did not remain in session after the date on which the judgment was pronounced.—*State v. Lu Sing*, 31.

Motion for Arrest of Judgment—Appeal.

24. An appeal from an order overruling a motion in arrest of judgment does not lie on behalf of the defendant. (Penal Code, sec. 2272.) *State v. Beesakove*, 41.

Denial of Motion in Arrest—How Reviewable.

25. An order overruling a motion in arrest of judgment is an intermediate order, reviewable on appeal from the judgment (Penal Code, sec. 2321.)—*State v. Beesskove*, 41.

Information—Sufficiency—Venue—Motion in Arrest.

26. The sufficiency of an information, with reference to the allegation of the venue of the crime, may be attacked for the first time by motion in arrest of judgment.—*State v. Beesskove*, 41.

Homicide—Information—Allegation as to Time and Place.

27. Allegations of time and place of the commission of the crime charged in an information are of the substance of the charge and must be so alleged, in ordinary and concise language, as to enable a person of common understanding to know what is intended by the charge.—*State v. Beesskove*, 41.

Homicide—Information—Allegation as to Place of Offense.

28. In an information for murder the only mention of the county in which the crime was committed appeared in the caption describing the court in which, and the officer by whom, the charge was preferred. In the charging part of the document the word "county" was not used at all, and the only reference words found there were in the expression "then and there," the first of which referred to a preceding date alleged as the date of the crime, while the latter indicated some place, not described, where the defendant then was. *Held*, that, in the absence of an expression such as "in the county aforesaid" or "said county," thus referring to the caption, the information did not allege the county in which the offense had been committed, and that the district court committed error in overruling a motion in arrest of judgment interposed by defendant.—*State v. Beesskove*, 41.

Homicide—New Trial—Misconduct of Jury—Affidavits of Jurors.

29. *Held*, that affidavits of two jurors, filed in aid of a motion for new trial by defendant in a prosecution for murder, in which both stated that they had misunderstood the instructions of the court (which explicitly and clearly charged the jury that they could find the accused guilty of any grade of unlawful homicide or acquit him), in that from a reading of them they were under the impression that the jury was required to either find the defendant guilty of murder in the first degree or acquit him, and that, being unwilling to acquit, they voted for murder in the first degree rather than to declare him innocent, did not, under Penal Code, section 2192, show such misconduct on the part of the jury as to entitle defendant to a new trial.—*State v. Beesskove*, 41.

Homicide—Cross-examination—Undue Restriction.

30. Where a witness, on a trial for homicide, testified that he and accused had had trouble, but denied that he had ever tried to frighten him, it was error to exclude a question on cross-examination as to whether he had not told any of the witnesses that he had done so, though the question did not call the witness' attention to the time and place of the alleged statements so as to lay a foundation for impeaching evidence under Code of Civil Procedure, section 3380.—*State v. Beesskove*, 41.

Homicide—Trial—Instructions—Witnesses.

31. In a prosecution for murder, it was error for the district court to refuse to charge the jury that in determining the weight to be given to the testimony of witnesses, the jury had a right to consider their appearance on the stand, their manner of testifying, their apparent candor or lack of it, their apparent fairness and means of knowledge,

together with all the facts and circumstances in the evidence; and such error was not cured by submitting, in place of the requested instruction, the language of section 3123 of the Code of Civil Procedure, supplemented by the words, that they were at liberty to disregard the testimony of any witness who had willfully and deliberately testified falsely to any material matter, unless corroborated.—*State v. Beesskove*, 41.

Appeal—Record—Bill of Exceptions—Settlement—Notice.

32. Where it does not appear, on appeal in a criminal case, that the statutory notice (Penal Code, sec. 2171; Laws 1903, p. 47) had been given to the county attorney as to the time when the draft of the proposed bill of exceptions would be presented to the district judge for settlement, or that the state had waived such notice the bill will not be considered by the appellate court.—*State v. Morrison*, 75.

Record—Questions Reviewable—Admissibility of Evidence.

33. Where, on appeal in a criminal case, the evidence is not in the record, alleged errors in respect to the admission of evidence will not be considered.—*State v. Morrison*, 75.

Record—Manner of Bringing up on Appeal.

34. The "record of the action" in a criminal case, as defined in Penal Code, section 2229, cannot be brought up on appeal in the body of a bill of exceptions.—*State v. Morrison*, 75.

Review—Invited Error—Instructions.

35. Errors in instructions given at the request of the defendant in a criminal case may not be complained of by him on appeal.—*State v. Morrison*, 75.

Homicide—Threats—Hearsay Testimony.

36. Testimony of a witness for the state, in a prosecution for murder, that he knew defendant had made threats against deceased, because his neighbors had told him so, was hearsay and inadmissible.—*State v. Trueman*, 249.

Homicide—Threats.

37. A threat, testified to by a witness for the state in a prosecution for homicide, as having been made by deceased in the following words: "I will get you sons-of-bitches yet," was inadmissible where the record failed to disclose that deceased was intended to be included in the class so characterized.—*State v. Trueman*, 249.

Homicide—Intoxication—Cross-examination.

38. Where a witness for the state, in a prosecution for murder, testified that he and deceased had been together on the day of the homicide and told generally of their movements, a question whether they had anything to drink that day was proper cross-examination for the purpose of showing such a condition of sobriety on the witness' part as to make it likely that he remembered what occurred and as shedding light upon the action of deceased, the contention of defendant having been that he acted in self-defense.—*State v. Trueman*, 249.

Homicide—Cross-examination—Self-defense.

39. It was error for the trial court in a prosecution for murder, to exclude a question asked a witness for the state on cross-examination, whether he had not seen deceased carrying an ax-handle around with him on the day of the homicide, where the witness on direct examination had stated that deceased had walked up behind witness and defendant and struck the latter over the shoulder with the handle—the evidence sought to be elicited not only having been proper cross-examination, but tending directly to sustain defendant's contention that deceased sought the encounter and had prepared himself for it.—*State v. Trueman*, 249.

Homicide—Self-defense—Cross-examination—Curing Error.

40. The mere fact that, in a prosecution for murder, evidence, on cross-examination, tending to show that deceased had sought the encounter and that defendant acted in self-defense, was cumulative in character, did not cure error in excluding it, since, if permitted to answer, the jury might have believed the witness under examination and not those preceding him.—*State v. Trueman*, 249.

Homicide—Intoxication—Cross-examination.

41. Where, in a prosecution for homicide, a witness had testified that he saw deceased on the day of the homicide and that he appeared to have been drinking, he should, on cross-examination, have been permitted to answer a question whether he noticed that the drinking affected the decedent's conduct, opinions of nonprofessional men as to intoxication, fear, anger, etc., being admissible in every judicial inquiry.—*State v. Trueman*, 249.

Homicide—Attorneys—Misconduct—Abuse of Witnesses.

42. In a prosecution for homicide an attorney employed by the widow of deceased to assist the state's attorney, who in course of the examination of a hostile witness, whom the court had compelled the state to call, and whose conduct toward counsel was exasperating and impertinent—remarked that the prosecution did not vouch for the witness, that he could not tell the truth, asked the witness whether he was *non compos mentis* or knew anything at all, and stated that witness unqualifiedly lied and was a "self-deluded fool that knew nothing," was guilty of such misconduct as will work a reversal of the judgment of conviction if properly presented for review.—*State v. Trueman*, 249.

Homicide—Objectionable Evidence—Misconduct of Attorneys.

43. Counsel for the state, in a prosecution for homicide, sought to get before the jury the fact that the deceased had left surviving him a widow and a small child. He proved this fact, over objection, but upon motion of defendant's counsel this testimony was later stricken out. Immediately upon this ruling, counsel for the prosecution called the widow and, by questions asked for that purpose, again brought the matter ordered stricken to the attention of the jury, and thereupon consented to the striking of this testimony. *Held*, that the behavior of counsel in asking questions which he knew, or had reason to believe, in view of the previous ruling, the court would not permit to be answered, constituted misconduct which, if properly presented, will work a reversal of the judgment of conviction.—*State v. Trueman*, 249.

Former Jeopardy.

44. *Held*, under *State v. Keerl*, 33 Mont. 501, 85 Pac. 862, that where the jury on a former trial of defendant charged with homicide had failed to agree, was discharged and the cause continued to the next succeeding term of court, the district court on the second trial properly refused to require the jury to return a verdict upon defendant's plea of former jeopardy.—*State v. Trueman*, 249.

Forgery—Bounty Certificates—Statutes—Title—Penalty Clause.

45. *Held*, that sections 3078 and 3079 of the Political Code, providing in substance, respectively, that a person falsely making, altering, forging or counterfeiting a bounty certificate shall be guilty of forgery, and that one doing certain acts with relation to such certificates with intent to defraud the state, shall be guilty of a misdemeanor, each section providing penalties, together constitute the penalty clause of the Act entitled "An Act to Provide a Bounty on Certain Stock-destroying Animals and a Fund for the Payment Thereof" (Pol. Code, secs. 3070-3080), and that, since a penalty clause

may be incorporated in an Act without being designated in its title, the legislation is not invalid because the provisions of section 3078 were not particularly set out in the title of the statute.—In re Terrett, 325.

Forgery—Bounty Certificates—Statutes—Who may not Raise Questions of Validity.

46. A person appointed to act as bounty inspector under the provisions of Act of March 6, 1903 (Laws 1903, p. 166), and who, while acting as such, was charged with forgery of bounty certificates, he having thus been at least a *de facto* officer, will not be heard to raise the question of the invalidity of the Act on the ground that it imposes duties upon district judges, in the selection of three representative stockgrowers to appoint bounty inspectors, not judicial in character.—In re Terrett, 325.

Forgery—Bounty Certificates—Information—Sufficiency.

47. An information which charged that accused feloniously did falsely make, forge and counterfeit a bounty certificate in that, while acting as bounty inspector under Act of 1903 (Laws 1903, p. 166), he made and delivered to a bounty claimant a certificate setting forth that such claimant had exhibited the skins of certain wild animals to him (defendant), had filed the necessary affidavits, and that defendant, as such inspector, had examined and marked the skins as required by law, whereas these precedent conditions to the issuance of the certificate had not been fulfilled, the defendant knowing that the statements so made were false, states a public offense under Political Code, section 3078, which provides that any person who shall falsely make, forge, etc., a bounty certificate shall be guilty of forgery.—In re Terrett, 325.

Forgery—Bounty Certificates—Statutes—Information.

48. The offense of forgery charged, under Political Code, section 3078, to have been committed by a bounty inspector in falsely making a bounty certificate, is not committed by making the false statements of fact in the certificate, but by making the certificate when certain conditions precedent to its issuance, with the fulfillment of which he is charged (Laws 1903, p. 166), have not been performed, and does not, therefore, necessarily fall within Penal Code, section 294, which declares that any public officer who makes a certificate containing statements which he knows to be false is guilty of a misdemeanor.—In re Terrett, 325.

Forgery—Bounty Certificates—Information—Sufficiency.

49. The crime of forgery charged against a bounty inspector under Political Code, section 3078, is purely statutory, and it is, therefore, not necessary to allege in the information extrinsic facts to show wherein or whereby the certificate charged to have been falsely made might apparently be of legal efficacy or the foundation of a legal liability.—In re Terrett, 325.

Grand Larceny—Information—Requisites—Felonious Intent.

50. An information charging the defendant with grand larceny, in that he "willfully, unlawfully and feloniously, and with the intent then and there to steal, did take, steal, carry and drive away" a certain mare and colt, is not open to the objection that it fails to allege that the taking was done with felonious intent,—since the term "feloniously" imports criminal intent,—but is sufficient both under the common law and under Penal Code, section 880, as amended by Session Laws of 1897, page 247.—State v. Allen, 403.

Conspiracy—Evidence—Declarations.

51. While the acts and declarations of a co-conspirator done and made in furtherance of a common design are admissible against all the other parties to the conspiracy, whether done or made in their presence or with their knowledge or not, they must have occurred after the conspiracy has been formed and before its accomplishment or abandonment.—*State v. Allen*, 403.

Larceny—Conspiracy—Evidence—Declarations of Co-conspirators.

52. Prior to the formation of a conspiracy for the stealing and disposing of horses entered into between defendant, one M. and one S., the latter without defendant's knowledge urged M. to buy defendant's ranch and pay for it with stolen horses, to be disposed of by defendant. Subsequently such an arrangement was made and the defendant included in the agreement. *Held*, that the conversation between M. and S. was inadmissible against defendant, in a prosecution for grand larceny, inasmuch as it did not appear that defendant knew of the proposition made to M. by S., and that therefore he could not be bound by anything said by them before he had become a party to the conspiracy.—*State v. Allen*, 403.

Larceny—Conspiracy—Evidence—Declarations—Time and Place.

53. In a prosecution for grand larceny, it is not necessary that a witness testifying to declarations of co-conspirators should be required to fix the time and place of their occurrence and give the names of those present before his statements can be admitted in evidence, such rule applying only to cases where it is sought to impeach a witness when under cross-examination.—*State v. Allen*, 403.

Larceny—Evidence of Other Crimes—Admissibility.

54. Where, in a prosecution for grand larceny, the evidence showed a conspiracy under which horses stolen by defendant's co-conspirators were to be disposed of by him for their mutual benefit, evidence of larcenies by his confederates other than the one for which he was on trial was properly admitted as tending to establish the conspiracy and to show intent on the part of the defendant, it appearing that he disposed of the animals and that the brands on them had been changed prior to their disposal.—*State v. Allen*, 403.

Larceny—Conspiracy—Evidence—Possession of Stolen Property.

55. The possession of stolen horses by defendant, charged with grand larceny, soon after they were stolen was an incriminating fact which, while not sufficient of itself to warrant conviction, tended to establish a conspiracy, alleged to have been entered into between him and his confederates, when taken in connection with the fact that the brands on the animals had been changed and that he received from his confederates, and disposed of, horses with many different brands without inquiry as to where they came from.—*State v. Allen*, 403.

Larceny—Instructions—Felonious Intent

56. An instruction given in a prosecution for grand larceny defining that crime substantially in the words of the statute, but omitting to supplement such definition by a statement that the taking of the property by defendant must have been done with a felonious intent was erroneous, and the casual use of the term "felonious" in a subsequent paragraph of the charge to the effect that the defendant should be acquitted if the jury were not satisfied that he "had something to do with the felonious taking of the property" did not cure the defect.—*State v. Allen*, 403.

Instructions—Witnesses—Invasion of Province of Jury.

57. An instruction submitted to the jury in a criminal prosecution, that where witnesses to the same transaction perfectly and entirely agree on all points connected with it, a suspicion of practice and concert is engendered and should to this extent be discredited, is an invasion of the province of the jury and erroneous.—State v. Allen, 403.

Instructions—Circumstantial Evidence—Value.

58. The trial court, in charging the jury in a criminal case as to the value to be given to circumstantial evidence, should include a statement that conviction should follow only if the circumstances are such as to satisfy their minds of defendant's guilt beyond a reasonable doubt to the exclusion of every other reasonable hypothesis, and should not instruct that they should convict if such evidence convinces their "guarded judgment."—State v. Allen, 403.

Instructions—Circumstantial Evidence—Invasion of Province of Jury.

59. *Semble*: It would seem that an instruction in a criminal prosecution that circumstantial evidence is in many cases quite as convincing as direct and positive evidence, is subject to the criticism that it comments on the weight of the evidence and invades the province of the jury.—State v. Allen, 403.

Instructions—Assumption of Facts—Principal—Accomplice.

60. For the district court to assume, in a criminal prosecution, in its charge to the jury, that a certain person was an accomplice of the defendant, was an assumption of the defendant's guilt of the crime charged and erroneous, since it implied that a crime had been committed and that there was a principal.—State v. Allen, 403.

Larceny—Instructions—Definition of Principal.

61. An instruction submitted in a prosecution for grand larceny, that a person who "advised or encouraged" another in the commission of a crime is to be considered a principal, instead of "advised and encouraged," the words used in section 41 of the Penal Code in defining the term "principal," was not prejudicially erroneous, the words "advised" and "encouraged" being synonymous in popular meaning.—State v. Allen, 403.

Larceny—Instructions—Definition of Principal.

62. *Held*, in a criminal appeal, that the use of the disjunctive "or" in defining a principal as one who "aids or abets" in the commission of a crime instead of the conjunctive "and," as prescribed by Penal Code, section 41, was erroneous, because the word "aid" does not imply guilty knowledge or felonious intent, while the term "abet" does include knowledge of the wrongful purpose of the perpetrator of, and counsel and encouragement in, the crime.—State v. Allen, 403.

Larceny—Instructions—Duty of Finder of Property.

63. Where, in a prosecution for grand larceny, no facts or circumstances are proven justifying the inference that the property alleged to have been stolen had been found by defendant or anyone else, an instruction as to the duty of a person finding property to restore it to the owner or to make a reasonable effort to do so is inapplicable and should not be given.—State v. Allen, 403.

Instructions—Definition of Crime.

64. An instruction embodying the provisions of sections 20 and 21 of the Penal Code upon the presence of joint operation of act and intent in order to constitute a crime, should be given in every criminal prosecution, especially when requested by defendant.—State v. Allen, 403.

Homicide—Instructions—To be Read as a Whole—"Malice Aforethought."

65. Where the jury, on a trial for murder, had been clearly and carefully instructed as to all grades of unlawful homicide, and, also, as to what constitutes justifiable homicide, and that defendant could not be convicted of murder of the first degree unless it appeared from the evidence beyond a reasonable doubt that all the necessary elements including "malice aforethought" were present, the omission of that term in a subsequent paragraph of the charge,—which dealt with the proposition that it was not necessary that the unlawful design to take life should have been entertained for any precise length of time, and that if done in furtherance of such design and without lawful excuse "as explained in these instructions," they should convict the defendant of murder of the first degree,—was not prejudicial or misleading, since the whole charge, when read and construed together, was a correct exposition of the law and not inconsistent or conflicting.—*State v. Houk*, 418.

Homicide—Instructions—Malice Aforethought.

66. Defendant having been convicted of murder of the second degree, the omission of the term "malice aforethought" in an instruction dealing with murder of the first degree, after all grades of unlawful homicide had been correctly defined in preceding paragraphs of the charge, could not have misled the jury to his prejudice.—*State v. Houk*, 418.

Homicide—Instructions—Self-defense—Reasonable Person Standard.

67. Where the trial court, in a prosecution for murder, instructed the jury that the right of self-defense was to be measured by what a reasonable person would have done under like or the same circumstances, the charge conformed to the requirements of section 361 of the Penal Code and was sufficient.—*State v. Houk*, 418.

Homicide—Instructions—"Beyond All Reasonable Doubt"—Omission.

68. Where the jury had been repeatedly instructed that they could not find defendant guilty of homicide unless the evidence established his guilt beyond all reasonable doubt, the omission of the words "beyond a reasonable doubt" in that part of the charge which stated that if "from the evidence," they found that accused, at the time he shot decedent, did not, as a reasonable man, believe that he was in imminent danger of losing his life, the killing was not in self-defense, did not constitute prejudicial error as leading the jury to believe that a verdict of guilty could be found on a mere preponderance of the evidence.—*State v. Houk*, 418.

Record—Appeal—When Merits will not be Considered.

69. The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record, nor identified in any way by the certificate of the clerk of the district court or the trial judge.—*State v. Farriss*, 424.

Appeal—Record—Dismissal.

70. The supreme court will not hesitate to dismiss an appeal in a criminal case on the ground that the proper record is not before it, where appellant's attention had been called to the defect by the state's brief for a period of two months prior to the day of hearing, without any attempt on his part to have the record corrected so as to conform to the requirements of the statute.—*State v. Farriss*, 424.

Forgery—Information—Insufficiency—Waiver.

71. Defendant, charged with forgery, entered a plea of not guilty. At the trial his counsel objected to the introduction of any testimony on the ground that the information was indefinite, unintelligible and uncertain. *Held*, that defendant, by his plea to the merits, waived any objection to the information on this ground.—*State v. Newman*, 434.

Forgery—Bounty Certificates—Statutes—County Attorneys.

72. The district court ruled correctly when it denied a motion of defendant, on trial for forging a bounty certificate, that the county attorney be required to state whether the prosecution was proceeding under section 3078 of the Political Code, which provides that any person who shall falsely make or counterfeit a bounty certificate shall be guilty of forgery, or under section 840 of the Penal Code, defining the crime of forgery, there being no rule of law making it incumbent on that officer to make known under what section of the Code a defendant is being tried.—*State v. Newman*, 434.

Forgery—Bounty Certificates—Statutes—Prejudice.

73. Where, before the defense of one charged with forging a bounty certificate was begun, it was definitely stated that the prosecution was being conducted under section 3078 of the Political Code, defendant was not prejudiced by a ruling theretofore made overruling his motion that the county attorney be required to state under what particular section of the Code he was proceeding.—*State v. Newman*, 434.

Forgery—Bounty Certificates—Written Evidence—Original Papers.

74. An objection to the introduction in evidence of certain bounty certificates, on the trial of one charged with forgery of such a paper, on the ground that no proper foundation had been laid, was properly overruled, where it appeared that the certificates sought to be introduced were originals properly identified.—*State v. Newman*, 434.

Witnesses—Indorsement on Information.

75. A witness in a criminal prosecution may not be prevented from testifying because his name was not indorsed on the information, where it does not appear from the record that the county attorney knew of the witness at the time he filed the information.—*State v. Newman*, 434.

Forgery—Bounty Certificates—Evidence of Other Offenses—When Admissible.

76. In a prosecution of a bounty inspector for forgery, evidence of like offenses with relation to certificates other than the one mentioned in the information was admissible for the purpose of showing that a system or general plan had been pursued by accused, a guilty knowledge or criminal intent on his part, and to negative the idea that the particular act for which he was on trial was the result of accident, mistake or inadvertence.—*State v. Newman*, 434.

Forgery—Offer of Proof—Defense—Evidence.

77. Proof offered by defendant, a bounty inspector charged with forging a bounty certificate, for the purpose of showing absence of criminal intent on his part in the transaction complained of, to the effect that he, as a furrier and taxidermist, had purchased a number of skins of wild animals, on which bounty had not been paid, and had prevailed upon another person to include such skins in a certificate issued to such other person, and who then swore that he had killed the whole number of animals represented by the certificate, did not constitute any defense, but showed defendant to be also guilty

of subornation of perjury and of a felony in purchasing claims against the state under Penal Code, section 136.—*State v. Newman*, 434.

Appeal—Record—Bill of Exceptions—Settlement—Notice.

78. Where it does not appear affirmatively from the record on appeal in a criminal case, that the two days' notice to the county attorney of the presentation of the bill of exceptions to the judge, or to the clerk for the judge, for settlement, required to be given by section 2171 of the Penal Code, had been given, the bill must be disregarded. *State v. Lee*, 584.

Record of Former Trial—Authentication—Transcript.

79. The record of the proceedings had at a former trial of a criminal cause, copied into the transcript on appeal but not authenticated by bill of exceptions or identified in any way, cannot be considered for any purpose.—*State v. Lee*, 584.

Record—Amendment in Supreme Court.

80. Where the record on appeal in a criminal cause failed to show affirmatively that two days' notice of the presentation of the bill of exceptions to the judge for settlement had been given, an offer, made at the hearing before the supreme court, to amend the transcript by attaching thereto certain orders of the district court extending the time for settling the bill, which showed that the county attorney was present and took part in the proceedings had at the settlement, will not be entertained, such orders not being part of the record and not supplying the deficiency as to notice.—*State v. Lee*, 584.

Robbery—Instructions—Credibility of Witnesses—Harmless Error.

81. An instruction given in a prosecution for robbery, which in effect told the jury that they were the exclusive judges of the credibility of the witnesses and had the right to reject all the testimony of any witness who in their opinion had been guilty of willful perjury "unless on any point such testimony is corroborated," could not have been understood by them otherwise than as a direction that they were not bound to accept any part of the statement as true, but that they were still at liberty to believe it or not as their judgment dictated, and could not be said to imply that if they found such testimony corroborated in any respect they should for that reason deem it credible. The instruction, while not technically correct, was not prejudicially erroneous. (*Mr. Justice Milburn dissenting.*)—*State v. Lee*, 584.

Robbery—Co-defendants—Instructions.

82. Where two defendants were informed against jointly for the crime of robbery, each claiming a separate trial, an instruction requested on the trial of one of them, that if the jury found that he or his confederate, or either of them, did not take any property from the possession of the complaining witness, they must find defendant not guilty, was properly refused, in that he was not entitled to an acquittal merely because his confederate had not taken any of the property in question.—*State v. Lee*, 584.

CROSS-EXAMINATION.

See Evidence, 1, 8, 17, 18, 19, 20, 35, 36, 39, 41.

DAMAGES.

Breach of contract to convey real property, see Real Property, 1.

Claim and delivery, see Claim and Delivery, 1, 2, 3.

Condemnation proceedings, see Eminent Domain, 2, 11-23.

Conversion, see Conversion, 1, 3-5.

Excessive, see Malicious Prosecution, 13; Eminent Domain, 21-23; Personal Injuries, 30.

Exemplary, see Malicious Prosecution, 10, 11.

In mitigation of, see Malicious Prosecution, 6.

See, also, Measure of Damages.

DECLARATIONS.

See Evidence, 23, 24, 25.

DEFAULT.

See, also, Eminent Domain, 10.

Vacation—Appealable Order.

1. Under section 1722 of the Code of Civil Procedure, as amended by Session Laws of 1899, page 146, an order, made before final judgment, refusing to set aside a default is not appealable.—Bowen v. Webb, 61.

Vacation—Discretion—Appeal.

2. The granting or refusing to grant a motion to set aside a default being within the sound legal discretion of the trial court, the burden rests upon appellant to show a manifest abuse of such discretion by the court in denying a motion of this character.—Bowen v. Webb, 61.

Motion to Vacate—Grounds.

3. To justify the granting of a motion to vacate a default, defendant must show that he proceeded with diligence; that the default occurred through his excusable neglect; that the judgment, if permitted to stand, will affect him injuriously; and that he has a defense to plaintiff's cause of action on the merits.—Bowen v. Webb, 61.

Motion to Vacate—Attorneys—Press of Business.

4. Affidavits submitted on an application to open a default, showing merely a press of business engagements on the part of defendant's attorney, which called him out of his office a great deal of the time, and caused him to mistake the day on which he was required to make his appearance, cannot be said to establish excusable neglect.—Bowen v. Webb, 61.

Vacation—Affidavit of Merits—Practice—Demurrer.

5. A default will not be vacated merely to permit the defendant to file a demurrer to the complaint, but the application must be accompanied by an affidavit showing a defense to the plaintiff's cause of action upon the merits.—Bowen v. Webb, 61.

Affidavit of Merits—Answer.

6. *Quære*: May an answer, when properly identified, sufficient in form and offered for that purpose, perform the office of an affidavit of merits requisite to an application to open a default?—Bowen v. Webb, 61.

Affidavit of Merits—Answer—Presumptions.

7. Where, on appeal from an order denying a motion to open a default so as to permit defendant to file a demurrer to the complaint, the bill of exceptions recited that the motion had been heard upon the complaint, motion and affidavits, it will not be presumed that a proffered answer, which was neither identified nor referred to as a paper offered in support of the motion, was considered by the court as an affidavit of merits.—*Bowen v. Webb*, 61.

DELIVERY OF PERSONAL PROPERTY.

See *Sales*, 3, 4, 5.

DISTRICT COURTS.

See, also, *Trial*; *Rules of District Courts*.

Murder—Verdict—Time for Pronouncing Sentence—Statutes.

1. A verdict of guilty of murder of the first degree was returned on November 10, 1905. On the day following judgment was pronounced, over objection of the defendant that under section 2210 of the Penal Code he was entitled to two full days after the rendition of the verdict, before sentence. *Held*, that the court may not pronounce judgment before the expiration of two days after rendition of the verdict, provided the term of court lasts that long; otherwise the time of pronouncing judgment must be postponed to a date as remote as can reasonably be fixed within the current term of court.—*State v. Lu Sing*, 31.

Murder—Time for Pronouncing Sentence—Presumptions.

2. When two days did not intervene between the rendition of a verdict of guilty in a capital case, and the pronouncement of judgment (Penal Code, sec. 2210), it will be presumed on appeal, in the absence of anything in the record to the contrary, that the court did not remain in session after the date on which the judgment was pronounced.—*State v. Lu Sing*, 31.

Terms—Judicial Notice.

3. Judicial notice will be taken by the supreme court of the fact that there are two or more counties in a certain judicial district in this state, that such district court has fixed terms, expiring at certain periods, and that the court is not open for the transaction of business at all times as in a district embracing one county only.—*State v. Lu Sing*, 31.

Rules—New Trial—Statement—Appeal.

4. A rule of the district court provided that the lines and pages in the statement on motion for a new trial should be numbered. To the settlement of a statement in the preparation of which this rule had been ignored, a technical objection was interposed and overruled. *Held*, that, since counsel did not invoke this rule for the purpose of facilitating labor in the settlement of the statement and making certain what was done respecting amendments, the supreme court on appeal will not interfere.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

New Trial—Statement—Rules.

5. Rules of district courts relative to preparation and arrangement of statements on motion for new trial and bills of exceptions are not made for the purpose of punishing a delinquent party, but to aid counsel and court and to make certain what is done.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Rules—Judicial Notice.

6. The supreme court will not take judicial notice of the provisions of rules of the district court.—*Bowen v. Webb*, 61.

Challenge to Panel—Witnesses—District Judges.

7. *Obiter*: A judge of the district court may be called as a witness when the regularity of the drawing of a jury in a criminal prosecution is questioned by a challenge to the panel, inasmuch as he orders such drawing and directs the clerk during its progress (Code Civ. Proc., sec. 261), and under Penal Code, section 2038, both judicial and ministerial officers whose irregularity is complained of, may be called upon to testify.—*State ex rel. Breen v. District Court et al.*, 106.

New Trial—Discretion.

8. For errors at law occurring during the trial prejudicially affecting the rights of the moving party, a new trial may be demanded as a matter of right, and where such errors are made manifest, the district court has no discretion but should grant the motion.—*Case et al. v. Kramer*, 142.

New Trial—Newly Discovered Evidence—Insufficiency of Evidence—Discretion.

9. A motion for a new trial on the ground of newly discovered evidence, or insufficiency of the evidence to justify the verdict, is addressed to the discretionary power of the trial court, and its action thereon will not be disturbed on appeal unless it appears that there has been a clear abuse of such power.—*Case et al. v. Kramer*, 142.

Requested Instructions—Refusal to Correct.

10. The district court is not bound to correct a requested instruction by striking out a sentence announcing an erroneous rule of law and then to give it as corrected; while it may do so, error cannot be predicated upon its refusal.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Water Rights—Contempt.

11. The proper way for a district court to enforce its order theretofore made adjusting water rights between claimants entitled thereto is by contempt proceedings, upon the filing of an affidavit showing a disregard of the order.—*State ex rel. Pew v. District Court et al.*, 233.

Trial—Decorum.

12. The district court should see that the trial of a cause is conducted in an orderly and decorous manner, and neither counsel nor witnesses should be permitted to violate the proprieties of the courtroom with impunity.—*State v. Trueman*, 249.

Findings—Action at Law.

13. In an action at law the findings of the jury are binding upon the court.—*Martin v. City of Butte*, 281.

Trial—Setting Aside Special Findings.

14. Under Code of Civil Procedure, section 1101, providing that, where a special finding of fact is inconsistent with the general verdict, the former controls and the court must give judgment accordingly, it may not set aside a special finding and enter judgment on the general verdict, but must enter judgment on the special finding, leaving it to the defeated party to pursue his remedy by a motion for a new trial.—*Martin v. City of Butte*, 281.

Bounty Inspectors—Appointment—Constitution.

15. Since bounty inspectors, provision for whose appointment is made in Act of March 6, 1903 (Laws 1903, p. 166), are not officers whose appointment is "otherwise provided for" in the Constitution (Const,

Art. VII, sec. 7), the legislature had the power to delegate the selection of three stockgrowers in each county to appoint bounty inspectors, to the district judges.—*In re Terrett*, 325.

Control of Process.

16. The district court has power to control its own process within just limits, and so to protect the rights of parties and prevent arbitrary and unwarranted action by its officers.—*State ex rel. Pauwelyn v. District Court et al.*, 345.

Reopening Case—Discretion—Review.

17. To permit a case to be reopened for the purpose of hearing further proof in a civil case, lay within the discretion of the trial court, and its action in the premises is reviewable only in case of abuse of such discretion.—*O'Neill v. State Savings Bank et al.*, 521.

DISTRICT JUDGES.

See District Courts.

DUE PROCESS OF LAW.

See Injunction, 3.

EIGHT-HOUR LAW.

Statutes—Intent of Legislature.

1. By Chapter 50 of the Laws of 1905, providing that eight hours shall constitute a day's labor on all public works, in mills and smelters for the treatment of ores and in underground mines, it is not intended to impose punishment upon laborers in any of the designated employments who do not work for a full period of eight hours in every working day, but its object is to prevent them from working continuously for a term longer than eight hours.—*State v. Livingston C. B. & M. Co.*, 570.

Statutes—Inhibition Applicable to Employer and Employee.

2. Chapter 50, page 105, of the Laws of 1905, making eight hours a day's work on certain employments, and providing that "every person, corporation, stock company or association of persons" violating the statute shall be guilty of a misdemeanor, is not open to the objection that it cannot be determined therefrom whether it is intended to punish the employer, employee or both for an infraction of its provisions; it includes within its inhibition both employer and employee, and the former may be punished for causing his employee to work for a longer period, and the latter for working continuously for a term exceeding eight hours.—*State v. Livingston C. B. & M. Co.*, 570.

Arbitrary Legislation.

3. The purpose of the legislation contained in Chapter 50, page 105 of the Laws of 1905, being to conserve the health and promote the happiness of workmen engaged on public works, in underground mines, and in mills and smelters for the reduction of ores, the criticism that it is harsh and arbitrary in that it prevents the employee from working more than eight hours, even if working by the hour, is not meritorious.—*State v. Livingston C. B. & M. Co.*, 570.

Emergency Cases—Review of Legislative Policy.

4. The fact that the legislature, in enacting Chapter 50, page 105, Laws of 1905, known as the "eight-hour law," did not make provision for cases of emergency where life or property is in danger, is not a valid objection to it, this consideration being one of legislative policy,

which courts will not review except where it appears that in its operation the Act in question would be so unreasonable that it could not be supposed that the legislature intended it to have the effect which would be brought about by its enforcement.—*State v. Livingston B. C. & M. Co.*, 570.

May Servant Prolong Labor in Emergency Cases?

5. *Quære*: May an employee prolong his labor beyond the eight-hour period prescribed by Chapter 50, page 105, Laws of 1905, where a sudden emergency arises whereby life or property is placed in imminent danger, without violating the spirit of the statute?—*State v. Livingston C. B. & M. Co.*, 570.

Statutory Construction—Constitutional Amendments—Regularity of Adoption—Review.

6. In construing Chapter 50, page 105, Laws of 1905, enacting the "eight-hour law," the question whether the amendment to the state Constitution relative to the subject, adopted by popular vote at the election of 1904, had been properly submitted, is immaterial, since the validity of the statute must be determined with reference to the Fourteenth Amendment to the federal Constitution, irrespective of whether or not the amendment to the state Constitution authorizes its enactment.—*State v. Livingston C. B. & M. Co.*, 570.

Right to Perform Labor for State—Freedom to Contract.

7. One who contracted with a city to lay a concrete sidewalk, and who was informed against and convicted for a violation of the provisions of Chapter 50, page 105, of the Laws of 1905, prescribing that eight hours should constitute a day's labor on all public works, cannot complain that the statute abridges his freedom to contract, since no one is entitled, as a matter of absolute right, to perform labor for the state or any of its subdivisions, and it is within the power of the state to prescribe under what conditions work may be performed for it or its municipalities.—*State v. Livingston C. B. & M. Co.*, 570.

Public Works—Governmental Control.

8. One convicted of a violation of the provisions of Chapter 50, Laws of 1905, page 105, for causing his employees to work for more than eight hours a day laying a concrete sidewalk for a city, may not complain that daily labor at such employment for a period longer than eight hours was not injurious to the laborer, since the state, through its municipal agent—the city—had full control of the work and could prescribe such conditions relative to the manner in which it should be done as it saw fit to impose; and this is not the exercise of police power, but the exercise of governmental control over the state's own work.—*State v. Livingston C. B. & M. Co.*, 570.

Mines—Smelters and Mills—Police Power—Constitution.

9. Held that the provisions of Chapter 50, Laws of 1905, page 105, limiting the hours of labor of employees in underground mines and in mills and smelters for the reduction of ores to eight hours a day, constitute a valid exercise of the police power of the state and are not obnoxious to constitutional provisions.—*State v. Livingston C. B. & M. Co.*, 570.

Private Contracts—Hours of Labor—State may not Interfere.

10. The right of persons engaged in private business to enter into contracts for labor with relation to such business is protected by the Fourteenth Amendment to the federal Constitution, and the state may not interfere.—*State v. Livingston C. B. & M. Co.*, 570.

EJECTMENT.

Findings—Public Lands—Proceedings in Land Office—Preventing Witnesses from Testifying.

1. A finding of the district court, in an action in ejectment, that plaintiff had prevented defendant from producing a certain witness in the hearing of a contest for the land in question, in the United States land office, was not supported by the evidence, which showed that plaintiff had brought the witness some distance to the place of hearing to testify for him, but upon inquiry found that he would not testify as expected, and therefore sent him home, saying that he did not want his opponent to get hold of him, a party not being under any obligation to reveal the existence of evidence to his adversary to his own detriment.—*Kennedy v. Dickie*, 205.

Preventing Witnesses from Testifying—Evidence.

2. The district court committed error in finding in an action in ejectment, that plaintiff procured another to cause the arrest and imprisonment of two persons so as to prevent their evidence from being secured by defendant in a contest for the land in question, in the land office of the United States, where it appeared from the evidence that while plaintiff and the persons causing the arrest were intimate and were witnesses at the trial of the contest and at the trial of the persons arrested, there was nothing to show that plaintiff had instigated the arrest or that the motive of him who caused it was to aid plaintiff.—*Kennedy v. Dickie*, 205.

Fraud—Conspiracy—Evidence—Findings.

3. Evidence in a suit to recover possession of certain land, that plaintiff and another were on a friendly footing and that the latter aided the former to establish his claim to the land in question in the United States land office, did not warrant the district court in finding that they had entered into a conspiracy to defraud the defendant of the land.—*Kennedy v. Dickie*, 205.

Witnesses—False Testimony at Contest—Fraud—Courts—Immaterial Findings.

4. A finding made in an action in ejectment that plaintiff and other witnesses swore falsely at the trial of a contest in the federal land office over the land in question in the ejectment suit, is immaterial, since in order to justify a court in interfering with a conclusion reached by that department, the fraud in respect to which relief was sought by defendant by way of equitable counterclaim, must have been extrinsic and collateral to the matter tried by it and not in a matter tried upon its merits and upon which the decision was rendered.—*Kennedy v. Dickie*, 205.

Defenses—Acquisition of Title *Pendente Lite*—Effect.

5. A recovery by plaintiff in ejectment may be defeated by defendant showing title in himself acquired subsequent to the commencement of the action.—*McCauley v. Jones*, 375.

EMINENT DOMAIN.

Condemnation Proceedings—Evidence—Exclusion—Harmless Error.

1. Where, in a proceeding to condemn a right of way across a mining claim for street railway purposes, the plaintiff company had offered in evidence a written offer made to defendants to construct at its own expense a tramway for their use in working their claim and to do other things to minimize the damage resulting from the taking of the way, which offer was excluded, but subsequently the manager of plaintiff testified without objection to the same offer in substance,

the error in excluding the prior offer, if error, was cured and not prejudicial.—*Butte Electric Ry. Co. v. Mathews et al.*, 487.

Same—Damages—Interest—Instructions—Judgment Must Conform to Verdict.

2. In a proceeding for the condemnation of a right of way across a mining claim for street railway purposes, the court instructed the jury that the compensation and damages to be assessed should be deemed to have accrued at the date of the summons, etc., and also that interest should be allowed upon the amount found by them from the day plaintiff took possession of the premises. The jury found the "total amount" to be awarded to defendants to be twelve hundred dollars. The court in entering judgment added interest on that amount. *Held*, under section 1102 of the Code of Civil Procedure, that in entering judgment it was the duty of the court to follow the verdict, and that the allowance of interest by it was error, the verdict indicating that the jury had followed the instruction and made all allowances, including interest, to which they thought defendants entitled.—*Butte Electric Ry. Co. v. Mathews et al.*, 487.

Railroads—Selection of Route—Who may not Complain.

3. When a railway company has selected a route for its railroad, under the statutes granting it the power, which it deems most advantageous, one claiming to have been injured by such selection may not be heard to say that another route could have been chosen.—*State ex rel. Bloomington L. & L. Co. v. District Court et al.*, 535.

Railroads—Streams—Changing of Channel.

4. A railway company has the right to select a route for its road which it deems most advantageous, and where a river interferes with such route, it has the power to secure land necessary for its use in constructing and maintaining the road on such route in such manner as to afford security for life and property.—*State ex rel. Bloomington L. & L. Co. v. District Court et al.*, 535.

Extent of Power—Limitations.

5. A railway company may acquire any land necessary for the construction and maintenance of its road and its adjuncts and appendages, under subdivision 3 of section 894, Civil Code, by purchase or by voluntary grant or donation, or by condemnation proceedings, under section 526 of the same Code, subject only to the limitations that the right of way shall not exceed two hundred feet in width, except where a greater width is required for excavations and embankments, and that the land for excavations, embankments, sidetracks, turnouts, shops, etc., shall not exceed the amount necessary for such uses and purposes.—*State ex rel. Bloomington L. & L. Co. v. District Court et al.*, 535.

Railroads—Eminent Domain—Streams—Changing of Channel—Part of Construction of Road.

6. *Held*, that the changing of the channel of a stream, which would otherwise have to be crossed by a railway to conform to the route selected by it, when necessary to make the road secure for life and property, is a part of the construction of the road, within the meaning of the statute.—*State ex rel. Bloomington L. & L. Co. v. District Court et al.*, 535.

Railroads—Eminent Domain—Streams—Changing of Channel—Supervisory Control.

7. The changing of the channel of a stream, when necessary to make a railroad secure for life and property, being a part of the construc-

tion of the road, within the meaning of the statute, the land necessary to make such change may be secured by the company, and the writ of supervisory control will not issue to annul an order of the district court appointing appraisers to determine the compensation to the owners of the land sought to be condemned.—*State ex rel. Bloomington L. & L. Co. v. District Court et al.*, 535.

Condemnation Proceedings—Appearance of Defendant—Failure—Effect.

8. *Held*, that defendant in condemnation proceedings is required to appear, either by demurrer or answer; and if he fails so to do, he has no standing in court for any purpose and may not be heard in the subsequent proceedings, notwithstanding the provisions of section 2221 of the Code of Civil Procedure, that the commissioners appointed to assess the damages shall hear the allegations and evidence of all persons interested, this section having reference to cases where the parties defendant are not in default.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Failure of Defendant to Plead—Effect—Duty of Court.

9. Failure of defendant in condemnation proceedings to appear, either by demurrer or answer, does not relieve the court of the duty of determining whether the use for which the property sought to be condemned is a public use, limiting the amount taken to the necessities of the case and ascertaining the damages as provided in sections 2220, 2221 and 2224 of the Code of Civil Procedure.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Failure of Plaintiff to Take Default—Effect—Presumptions.

10. Where plaintiff railroad company in a condemnation proceeding failed to take default against defendants, who had not answered or demurred, but permitted the case to proceed as if pleadings had been filed and issues properly made, and found no fault with any of the proceedings until hearing in the district court, it will be presumed that issues were made and properly determined.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Damages—Pleadings—Counterclaims—Statutes.

11. Title VII, Part III of the Code of Civil Procedure does not require, either expressly or by implication, the defendant in condemnation proceedings to set up his claims for damages, special or general, and section 691 of that Code will not permit their being pleaded by way of counterclaim; and, therefore, plaintiff railroad company cannot be heard to complain that, by defendant's failure to plead them, it had no notice of their character and amount and was deprived of an opportunity to controvert them.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Measure of Damages—Elements of Value.

12. In determining the amount of damages which defendants in condemnation proceedings for a railroad right of way are entitled to recover, the court must take into consideration every element of value which would enter into the transaction if the parties plaintiff and defendant were negotiating a voluntary sale—i. e., ascertain the market value of the land after the right of way is taken.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Damages to Lands not Taken—Pleadings—Evidence.

13. In the absence of statutory provision making it incumbent upon defendants in condemnation proceedings, instituted by a railroad company for right of way purposes, to specially plead damages to portions of their lands not actually traversed by the road and not de-

scribed in the petition, they were not required so to do, and evidence showing such damages was properly admissible.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Lands in Compact Bodies—Damages to Those not Taken.

14. Where the lands over which a right of way was sought by a railroad company were all in a compact body, it was within the purview of the court's duty to ascertain what damages had accrued, not only to that portion described in the complaint, but also to the whole of the body, a part of which only is taken by the company.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Lands not Taken—Damages not Special—Pleadings.

15. Damages accruing to portions of the land of defendant in condemnation proceedings, instituted by a railroad company to secure a right of way, not actually traversed by the road, are not special in the sense that they should be pleaded.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Pleadings of Plaintiff—Estoppel.

16. A railroad company seeking to acquire a right of way, but failing in its petition to mention the land not taken or damages thereto, cannot be heard to say that the detriment to the part not described is special and must be pleaded before it can be shown in evidence.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Evidence—Offers to Purchase—Hearsay.

17. Evidence offered by plaintiff railroad company in condemnation proceedings for the purpose of showing an increase in the value of land in a certain locality since the building of its road, that offers of purchase, indicating an enhancement in value, had been made for parcels of land in the vicinity of that sought to be condemned for a right of way, which offers arose out of negotiations between persons not parties to, or witnesses in, the proceedings, was not only hearsay and therefore properly excluded, but its value depended upon the determination of so many collateral issues that it could not be relied on with safety.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Damages and Benefits—Witnesses—Evidence—Harmless Error.

18. Where in proceedings to condemn a railroad right of way, the jury assessed the damages and benefits separately as required by statute, finding the items well within the extreme limits of the testimony adduced, the mere fact that certain witnesses were permitted to give their opinions as to damages sustained by defendants after deducting all benefits, and were not required to state the damages sustained and benefits derived by the building of the road separately, if error, was harmless, the witnesses having been questioned fully as to the basis of their opinions, and the jury not having been misled.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Setoffs.

19. *Quære*: In an action in eminent domain to condemn land for a railroad right of way, may any increase in the market price of defendant's lands, by reason of the building of plaintiff's road, be set off against any damages accruing to portions not actually taken?—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Instructions—Award of Commissioners—Evidence.

20. An instruction, given by the district court in a proceeding looking to the condemnation of land for a railroad right of way, that the jury in arriving at a verdict should not consider the award thereto-

fore made by the commissioners appointed to assess the damages, but should confine themselves exclusively to the testimony of the witnesses examined at the hearing before them, was a correct statement of the law, where the award formerly made by the commissioners had not been introduced in evidence and where the only reference made to it had been during the cross-examination of two of the commissioners, as to the amounts fixed by them in their award, which agreed with those fixed by them at the trial.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Verdict—Appeal—Review.

21. Where the evidence taken as a whole gave substantial support to the findings of the jury in favor of defendants in condemnation proceedings, their verdict will not be disturbed on appeal, although the statements of many of the witnesses were conflicting and unsatisfactory upon material points.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Excessive Verdict—Review.

22. Where the question, whether the lands not actually taken by a railroad company for a right of way, but adjoining it, had increased in value had been agitated in proceedings for condemnation, the opinions of witnesses conflicting sharply as to the effect the building of the road had had on values along the line of road, and had been fairly submitted to the jury, who found that there were no benefits, and where on motion for new trial their findings had been re-examined by the court and the motion denied, their verdict, though larger than the award made by the commissioners, but well within the highest estimate of any witness, will not be disturbed as being excessive.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Findings of Jury—Excessive Verdict—Review.

23. Findings of the jury, in condemnation proceedings, with relation to the amount of damages sustained by defendants by the taking of a railroad right of way through their lands, complained of as excessive, will not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of the "just compensation" provided for by section 14, Article III of the Constitution.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

EQUAL PROTECTION OF THE LAW.

See Constitution, 23.

EQUITY.

See Injunction, 1; Life Insurance, 7.

ESTOPPEL.

Contracts—Rescission.

1. Where certain bonds purchased by plaintiff specifically provided that the entire contract was therein set forth; that no one had authority to alter, change or modify the same in any manner; and that defendant company issuing the bonds was not to be bound by any statement, promise or agreement not therein contained, made by any person—plaintiff, by retaining the bonds, making monthly payments thereon for more than a year after the date of their receipt, and further obtaining permission from defendant to act as its agent in the same capacity as that in which another agent was acting at the time plaintiff

entered into the contract, was thereby estopped from rescinding the contract on the ground that he was misled to his prejudice by any representations made by such other agent or by any circular given him by the latter or mailed to him by the company before or after receiving the bonds.—*Grindrod v. Anglo-Am. Bond Co.*, 169.

Special Administrators—Appointment—Objection—District Courts—Jurisdiction.

2. The mere fact that the widow of testator asked that she be appointed special administratrix of the estate of decedent, when a legal cause for the appointment of such officer did not exist, did not estop her to object to the appointment of another or confer jurisdiction upon the court to appoint another.—*State ex rel. Eakins v. District Court et al.*, 226.

Probate Proceedings—Allowance to Widow—Objections.

3. The indulgence of persons, interested in the estate of an intestate, in not compelling an administratrix to make final settlement and distribution after the expiration of a reasonable length of time in which to wind up the affairs of the estate, did not estop them to object to an allowance, claimed by her in her individual capacity as widow of her intestate, after the date when settlement should have been made.—*In re Dougherty's Estate*, 336.

EVIDENCE.

See, also, *Malicious Prosecution*, 2; *Judicial Notice*, 3.

Criminal Law—Murder—Cross-examination—Exclusion—Harmless Error.

1. While the interest and feeling exhibited by a witness are material elements to be weighed by the jury in determining his credibility, yet, where in a prosecution for murder, a witness for the state had testified on cross-examination that he had not told the county attorney that he wanted to testify but that he "just went up there and told him"—thus making his interest in the case apparent to the jury—the exclusion of a further question whether he had sent anyone else to tell the county attorney of his desire to testify, though technically erroneous as an undue restriction of the cross-examination, was without prejudice.—*State v. Fuller*, 12.

Refusal to Strike Out—Error Cured—Criminal Law.

2. Where the trial court, in a prosecution for murder, at first refused to strike out certain hearsay testimony, but subsequently ordered it stricken, and admonished the jury, both orally and in an instruction, not to consider it in making up their verdict, the prior erroneous ruling was fully cured and defendant cannot be heard to complain.—*State v. Fuller*, 12.

Criminal Law—Waiver—Comparison of Shoes with Footprints—Admissibility—Constitutional Guaranties.

3. Where, on a trial for murder, defendant consented to the taking of his shoes for the purpose of comparison with footprints, leading from the place of the homicide, he waived the right to object to the use of such evidence against him on the ground that the Constitution, Article III, section 18, forbids its use when it declares that no person shall be compelled to testify against himself in a criminal proceeding.—*State v. Fuller*, 12.

Criminal Law—Trial—District Courts—Commenting on.

4. Where, in a prosecution for murder, the trial court casually remarked, when a transcript of the evidence taken at the coroner's inquest was offered in defendant's behalf for impeachment purposes, that it was admitted for "what it was worth," such remark was not

prejudicial to the defendant as a comment upon the weight of the evidence so offered.—*State v. Fuller*, 12.

Criminal Law—Witnesses—Competency—Chinaman—Ability to Tell Nature of Oath.

5. A Chinaman who, upon being tested as to his competency as a witness, stated that he could tell what he knew and that what he would say would be the truth, but that he did not know the nature of an oath, was qualified to testify under Code of Civil Procedure, section 3161, he not falling within the exceptions noted in section 3162, as amended (Laws 1897, p. 245), or those mentioned in section 3163 of the same code.—*State v. Lu Sing*, 31.

Criminal Law—Murder—Admissions—Competency.

6. Where, in a prosecution for murder, the peace officer who took the defendant, a Chinaman, into custody, testified that on his way to jail the latter attempted to converse with him, but that he only understood a portion of what he said, reciting the part so understood by him, it was not error for the trial court to refuse to strike out all of the witness' testimony relative to the conversation on an objection that, since he had not understood all, he should not be permitted to testify to a portion only, it appearing that the court had properly cautioned the jury as to the weight to be given by them to this character of evidence.—*State v. Lu Sing*, 31.

Criminal Law—Homicide—Objections to—Form.

7. An objection to questions asked defendant, charged with murder, on cross-examination that the evidence sought was "incompetent, irrelevant, immaterial and not cross-examination" was too general, where it was apparent that the evidence sought was material.—*State v. Lu Sing*, 31.

Criminal Law—Homicide—Cross-examination—Undue Restriction.

8. Where a witness, on a trial for homicide, testified that he and accused had had trouble, but denied that he had ever tried to frighten him, it was error to exclude a question on cross-examination as to whether he had not told any of the witnesses that he had done so, though the question did not call the witness' attention to the time and place of the alleged statements so as to lay a foundation for impeaching evidence under Code of Civil Procedure, section 3380.—*State v. Beeskove*, 41.

Criminal Law—Record—Questions Reviewable—Admissibility of.

9. Where, on appeal in a criminal case, the evidence is not in the record, alleged errors in respect to the admission of evidence will not be considered.—*State v. Morrison*, 75.

Sufficiency—Contracts—Fraud—False Representations.

10. Evidence examined, and held insufficient to show that the purchase of certain bonds by plaintiff was induced by false statements on defendant's part contained in certain circulars.—*Grindrod v. Anglo-Am. Bond Co.*, 169.

Contracts—Breach—Sufficiency.

11. Evidence examined and held insufficient to sustain a cause of action for the breach of the conditions of a contract for the purchase of certain cumulative bonds.—*Grindrod v. Anglo-Am. Bond Co.*, 169.

Ejectment—Findings—Public Lands—Proceedings in Land Office—Preventing Witnesses from Testifying.

12. A finding of the district court, in an action in ejectment, that plaintiff had prevented defendant from producing a certain witness in the hearing of a contest for the land in question, in the United

States land office, was not supported by the evidence, which showed that plaintiff had brought the witness some distance to the place of hearing to testify for him, but upon inquiry found that he would not testify as expected, and therefore sent him home, saying that he did not want his opponent to get hold of him, a party not being under any obligation to reveal the existence of evidence to his adversary to his own detriment.—*Kennedy v. Dickie*, 205.

Ejectment—Preventing Witnesses from Testifying—Evidence.

13. The district court committed error in finding in an action in ejectment, that plaintiff procured another to cause the arrest and imprisonment of two persons so as to prevent their evidence from being secured by defendant in a contest for the land in question in the land office of the United States, where it appeared from the evidence that while plaintiff and the persons causing the arrest were intimate and were witnesses at the trial of the contest and at the trial of the persons arrested, there was nothing to show that plaintiff had instigated the arrest or that the motive of him who caused it was to aid plaintiff.—*Kennedy v. Dickie*, 205.

Ejectment—Fraud—Conspiracy—Evidence—Findings.

14. Evidence in a suit to recover possession of certain land, that plaintiff and another were on a friendly footing and that the latter aided the former to establish his claim to the land in question in the United States land office, did not warrant the district court in finding that they had entered into a conspiracy to defraud the defendant of the land.—*Kennedy v. Dickie*, 205.

Criminal Law—Homicide—Threats—Hearsay Testimony.

15. Testimony of a witness for the state, in a prosecution for murder, that he knew defendant had made threats against deceased, because his neighbors had told him so, was hearsay and inadmissible.—*State v. Trueman*, 249.

Criminal Law—Homicide—Threats.

16. A threat, testified to by a witness for the state in a prosecution for homicide, as having been made by deceased in the following words: "I will get you sons-of-bitches yet," was inadmissible where the record failed to disclose that deceased was intended to be included in the class so characterized.—*State v. Trueman*, 249.

Homicide—Intoxication—Cross-examination.

17. Where a witness for the state, in a prosecution for murder, testified that he and deceased had been together on the day of the homicide and told generally of their movements, a question whether they had anything to drink that day was proper cross-examination for the purpose of showing such a condition of sobriety on the witness' part as to make it likely that he remembered what occurred and as shedding light upon the action of deceased, the contention of defendant having been that he acted in self-defense.—*State v. Trueman*, 249.

Homicide—Cross-examination—Self-defense.

18. It was error for the trial court, in a prosecution for murder, to exclude a question asked a witness for the state on cross-examination, whether he had not seen deceased carrying an ax handle around with him on the day of the homicide, where the witness on direct examination had stated that deceased had walked up behind witness and defendant and struck the latter over the shoulder with the handle—the evidence sought to be elicited not only having been proper cross-examination, but tending directly to sustain defendant's contention that deceased

sought the encounter and had prepared himself for it.—*State v. Trueman*, 249.

Homicide—Self-defense—Cross-examination—Curing Error.

19. The mere fact that, in a prosecution for murder, evidence, on cross-examination, tending to show that deceased had sought the encounter and that defendant acted in self-defense, was cumulative in character, did not cure error in excluding it, since, if permitted to answer, the jury might have believed the witness under examination and not those preceding him.—*State v. Trueman*, 249.

Homicide—Intoxication—Cross-examination.

20. Where, in a prosecution for homicide, a witness had testified that he saw deceased on the day of the homicide and that he appeared to have been drinking, he should, on cross-examination, have been permitted to answer a question whether he noticed that the drinking affected the decedent's conduct, opinions of nonprofessional men as to intoxication, fear, anger, etc., being admissible in every judicial inquiry.—*State v. Trueman*, 249.

Malicious Prosecution—Justice's Record.

21. Where, in an action for malicious prosecution, it appeared that plaintiff had been charged with larceny before a justice of the peace, a recital of the justice's docket, after the entry that defendant had been found not guilty and had been discharged, that, as there were no grounds for complaint, judgment was entered against the complaining witness, for costs, was inadmissible, whether offered as a prior adjudication of the issue on the trial or as an expression of the opinion of the justice thereon.—*Martin v. Corscadden*, 308.

Reception—Timely Objection.

22. An objection to evidence not made until after it has been admitted, is too late, and, though erroneously admitted, the court is not then bound to strike it out.—*Martin v. Corscadden*, 308.

Criminal Law—Larceny—Conspiracy—Declarations.

23. While the acts and declarations of a co-conspirator done and made in furtherance of a common design are admissible against all the other parties to the conspiracy, whether done or made in their presence or with their knowledge or not, they must have occurred after the conspiracy has been formed and before its accomplishment or abandonment.—*State v. Allen*, 403.

Criminal Law—Larceny—Conspiracy—Declarations of Co-conspirators.

24. Prior to the formation of a conspiracy for the stealing and disposing of horses entered into between defendant, one M. and one S., the latter without defendant's knowledge urged M. to buy defendant's ranch and pay for it with stolen horses, to be disposed of by defendant. Subsequently such an arrangement was made and the defendant included in the agreement. *Held*, that the conversation between M. and S. was inadmissible against defendant, in a prosecution for grand larceny, inasmuch as it did not appear that defendant knew of the proposition made to M. by S., and that therefore he could not be bound by anything said by them before he had become a party to the conspiracy.—*State v. Allen*, 403.

Criminal Law—Larceny—Conspiracy—Declarations—Time and Place.

25. In a prosecution for grand larceny, it is not necessary that a witness testifying to declarations of co-conspirators should be required to fix the time and place of their occurrence and give the names of those present before his statements can be admitted in

evidence, such rule applying only to cases where it is sought to impeach a witness when under cross-examination.—State v. Allen, 403.

Criminal Law—Larceny—Other Crimes—Admissibility.

26. Where, in a prosecution for grand larceny, the evidence showed a conspiracy under which horses stolen by defendant's co-conspirators were to be disposed of by him for their mutual benefit, evidence of larcenies by his confederates other than the one for which he was on trial was properly admitted as tending to establish the conspiracy and to show intent on the part of the defendant, it appearing that he disposed of the animals and that the brands on them had been changed prior to their disposal.—State v. Allen, 403.

Criminal Law—Larceny—Conspiracy—Possession of Stolen Property.

27. The possession of stolen horses by defendant, charged with grand larceny, soon after they were stolen was an incriminating fact which, while not sufficient of itself to warrant conviction, tended to establish a conspiracy, alleged to have been entered into between him and his confederates, when taken in connection with the fact that the brands on the animals had been changed and that he received from his confederates, and disposed of, horses with many different brands without inquiry as to where they came from.—State v. Allen, 403.

Impeachment—Value of.

28. Contradictions or inconsistencies in the testimony of a witness which grow out of inadvertence, inattention or defect of memory are of less value for impeachment purposes than when they are the results of statements shown to be willfully false.—State v. Allen, 403.

Contradictions—Value of.

29. Where contradictions in a witness' testimony arise out of a willful perversion of the truth, the jury may disregard the whole of it, except so far as it is corroborated in other particulars by other credible evidence in the case.—State v. Allen, 403.

Criminal Law—Instructions—Contradictions—Invasion of Province of Jury.

30. While the jury may inquire whether contradictions in a witness' testimony are only apparent or due to lapse of memory or the like, or to willful perjury, and determine its weight accordingly, it is error in a criminal case to instruct them that "prominent and striking" contradictions should be attributed to deliberate perjury rather than to the ordinary infirmities of mankind, in that such a statement invades the province of the jury.—State v. Allen, 403.

Circumstantial—Criminal Law—Instructions—Value.

31. The trial court in charging the jury in a criminal case as to the value to be given to circumstantial evidence, should include a statement that conviction should follow only if the circumstances are such as to satisfy their minds of defendant's guilt beyond a reasonable doubt to the exclusion of every other reasonable hypothesis, and should not instruct that they should convict if such evidence convinces their "guarded judgment."—State v. Allen, 403.

Circumstantial—Criminal Law—Instructions—Invasion of Province of Jury.

32. *Semble*: It would seem that an instruction in a criminal prosecution that circumstantial evidence is in many cases quite as convincing as direct and positive evidence, is subject to the criticism that it comments on the weight of the evidence and invades the province of the jury.—State v. Allen, 403.

Forgery—Bounty Certificates—Original Papers.

33. An objection to the introduction in evidence of certain bounty certificates, on the trial of one charged with forgery of such a paper, on the ground that no proper foundation had been laid, was properly overruled, where it appeared that the certificates sought to be introduced were originals properly identified.—*State v. Newman*, 434.

Forgery—Bounty Certificates—Other Offenses—When Admissible.

34. In a prosecution of a bounty inspector for forgery, evidence of like offenses with relation to certificates other than the one mentioned in the information was admissible for the purpose of showing that a system or general plan had been pursued by accused, a guilty knowledge or criminal intent on his part, and to negative the idea that the particular act for which he was on trial was the result of accident, mistake or inadvertence.—*State v. Newman*, 434.

Notaries—Mortgages—False Certificate—Cross-examination.

35. In an action against a notary and the sureties on his official bond, for falsely certifying an acknowledgment to a mortgage on the security of which plaintiff had advanced money, plaintiff was asked on direct examination whether he had any interest in the note and mortgage, both of which ran to another person. Plaintiff answered in the affirmative. On cross-examination he was asked why the mortgage had been made to such other person. An objection was overruled and the witness replied that it was done to avoid his having to pay taxes on the mortgage. *Held*, that the evidence was proper cross-examination, and admissible for the purpose of affecting the credibility of the witness.—*Mahoney v. Dixon et al.*, 454.

Notaries—Mortgages—False Certificate—Cross-examination.

36. On direct examination plaintiff, in an action against a notary and the sureties on his official bond for damages consequent upon a false certification of an acknowledgment to a mortgage, was asked to state what, if any, efforts he had made with a view to recover the amount of money he had advanced on the mortgage. He replied that he had endeavored to secure it from one R., who had introduced the mortgagor to the notary, and failing in this he had approached the notary with a like demand. On cross-examination he was asked whether R. or his partner had made any offers of settlement. An objection having been overruled, he replied that he could not recollect that any efforts [offers] were made. *Held*, that the question was proper cross-examination, and that in any event no prejudice could have resulted from the answer.—*Mahoney v. Dixon et al.*, 454.

Verdict Against Evidence—Failure of Proof—Appeal.

37. The verdict for defendants in an action against a notary on his official bond for falsely certifying to an acknowledgment of a mortgage was not open to the objection that it was not justified by the evidence, where the only testimony of the transaction on the part of plaintiff was that of himself and wife, which was contradictory of their respective stories given at a former trial of the cause, a fact which the jury were at liberty to take into consideration on the question of their credibility, and if their testimony on the second trial was disregarded, there was an entire failure of proof, and the verdict for defendants was proper.—*Mahoney v. Dixon et al.*, 454.

Sufficiency—Conversion—Damages—Appeal.

38. Where, in an action for damages for the conversion of personal property by a constable, the evidence, though conflicting as to the amount of damages sustained, would have warranted the jury in find-

ing a much larger amount in favor of plaintiff than it did, the contention of defendant on appeal that the evidence was insufficient to sustain the verdict is without merit.—*Borden v. Lynch*, 503.

Conversion—Trial—Cross-examination.

39. Plaintiff, in an action for damages for the conversion of certain personal property by defendant constable, testified that she was the owner of a mortgage on the property in question and a note secured thereby. On cross-examination she was asked what consideration she had given for the instruments. *Held*, under section 3376 of the Code of Civil Procedure, that, while the rule announced in said section should be extended rather than restricted, it should not be extended to matters not connected with the subject matter upon which the examination in chief was had, and that therefore cross-examination, in this instance, as to consideration or other circumstances which resulted in the execution of the note and mortgage had been properly excluded.—*Borden v. Lynch*, 503.

Trial—Witnesses—Examination.

40. For the district court to refuse a witness permission to answer a question, which had once before been answered, objection having been interposed, is not error.—*Borden v. Lynch*, 503.

Trial—Witnesses—Cross-examination—Parties.

41. The rule that the cross-examination of a witness should be confined to matters deposed to in chief, applies to parties as well as to other witnesses.—*Borden v. Lynch*, 503.

Sufficiency—Appeal—Record.

42. Evidence will not be reviewed on appeal to determine its sufficiency where the record fails to show affirmatively that all, or the substance of all, the evidence in the case, is before the appellate tribunal. *Kelly v. City of Butte*, 530.

Personal Injuries—Cities and Towns—Damages—Excessive Verdict.

43. Where plaintiff, in an action against a city for damages on account of personal injuries sustained by reason of defendant's negligence in permitting an excavation adjoining a sidewalk to remain unguarded, fell a distance of seven or eight feet, was severely cut about the head, had one tooth knocked out and another broken, was bruised in the hips and suffered other like injuries, a verdict for \$1,000 may not be said to be unwarranted by the evidence; and where defendant city did not itself complain that it was excessive, the supreme court on appeal will not say that it is.—*Kelly v. City of Butte*, 530.

Eminent Domain—Offers to Purchase—Hearsay.

44. Evidence offered by plaintiff railroad company in condemnation proceedings for the purpose of showing an increase in the value of land in a certain locality since the building of its road, that offers of purchase, indicating an enhancement in value, had been made for parcels of land in the vicinity of that sought to be condemned for a right of way, which offers arose out of negotiations between persons not parties to, or witnesses in, the proceedings, was not only hearsay and therefore properly excluded, but its value depended upon the determination of so many collateral issues that it could not be relied on with safety.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Eminent Domain—Damages and Benefits—Harmless Error.

45. Where in proceedings to condemn a railroad right of way, the jury assessed the damages and benefits separately as required by statute, finding the items well within the extreme limits of the testimony ad-

duced, the mere fact that certain witnesses were permitted to give their opinions as to damages sustained by defendants after deducting all benefits, and were not required to state the damages sustained and benefits derived by the building of the road separately, if error, was harmless, the witnesses having been questioned fully as to the basis of their opinions, and the jury not having been misled.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

EXCEPTIONS.

See Appeal, 66.

EXCESSIVE DAMAGES.

See Damages.

EXECUTORS.

See Probate Proceedings; Wills.

FAILURE OF PROOF.

See Evidence, 37.

FELLOW-SERVANTS.

See Master and Servant, 6.

FENCES.

See Trespass, 1, 2.

FINDINGS.

See, also, Ejectment, 1, 2, 3, 4.

Implied—When Proper.

1. Where the district court fails to specifically find upon an issue, raised by an allegation in the answer and a denial thereof in the reply, a finding in consonance with the allegation in the answer will be implied unless such implied finding is inconsistent with any express finding of the court.—*Beaverhead Canal Co. v. Dillon El. L. & P. Co. et al.*, 135.

Implied and Inconsistent—Water Rights—Spring and Seepage Waters.

2. Where, in a suit to determine water rights, the court expressly found that certain spring and seepage water had its rise in the bed of a creek the waters of which flowed into a river to which it was a tributary, and that the creek water flowed into such river at all times above the head of a certain ditch, a finding that such spring or seepage water would not, if permitted to flow uninterruptedly, reach the head of said ditch, would be inconsistent with the other findings, and may, therefore, not be implied.—*Beaverhead Canal Co. v. Dillon El. L. & P. Co. et al.*, 135.

Actions at Law—District Courts.

3. In an action at law the findings of the jury are binding upon the court.—*Martin v. City of Butte*, 281.

Trial—District Courts—Setting Aside Special Findings.

4. Under Code of Civil Procedure, section 1101, providing that, where a special finding of fact is inconsistent with the general verdict, the former controls and the court must give judgment accord-

ingly, it may not set aside a special finding and enter judgment on the general verdict, but must enter judgment on the special finding, leaving it to the defeated party to pursue his remedy by a motion for a new trial.—*Martin v. City of Butte*, 281.

FORECLOSURE.

See Mortgages; Liens; Attorneys' Liens.

FORGERY.

See Criminal Law, 45, 46, 47, 48, 49, 71, 72, 73, 74, 75, 76, 77.

FORMER JEOPARDY.

See Criminal Law, 44.

FRAUD.

See, also, Ejectment, 3, 4; Conversion, 2, 3, 5.

Contracts—False Representations—Evidence—Sufficiency.

1. Evidence examined, and *held* insufficient to show that the purchase of certain bonds by plaintiff was induced by false statements on defendant's part contained in certain circulars.—*Grindrod v. Anglo-Am. Bond Co.*, 169.

Contracts—Rescission—Reliance on Representations.

2. Where it appears that plaintiff, in an action to rescind a contract, into which he alleged he was induced to enter by false and fraudulent representations made to him by defendant, had investigated for himself or had the means at hand to ascertain the truth or falsity of any representations made to him, his reliance upon such representations, however false they may have been, affords no ground of complaint.—*Grindrod v. Anglo-Am. Bond Co.*, 169.

FREE COUNTY HIGH SCHOOLS.

Trustees—Taxation—Injunction.

1. The complaint in an action by a taxpayer to enjoin the trustees of a free county high school—claimed to have been established contrary to law (Laws 1899, p. 59; Laws 1901, p. 6)—from presenting to the board of county commissioners an estimate of the tax rate required to raise the funds necessary for buildings, teachers and necessary apparatus, alleged that if permitted to certify such rate to the board of commissioners it would levy the same on all taxable property in the county which in effect would constitute a lien on such property, including plaintiff's. *Held*, that a general demurrer was properly sustained in that it did not appear that the plaintiff was suffering or was about to suffer any injury for which he had not an adequate remedy; that the action was prematurely brought, inasmuch as the commissioners had not assumed to levy the tax, and that if they should proceed to act, plaintiff would have a remedy by appeal to the district court.—*Morse v. Jacky et al.*, 165.

Board of Trustees—Not Part of Taxing Power.

2. The board of trustees of a free county high school (Laws 1899, p. 59; Laws 1901, p. 6), required by law to certify to the board of county commissioners an estimate of the tax rate necessary to raise the funds for the establishment thereof, is not by such requirement made a part of the taxing power.—*Morse v. Jacky et al.*, 165.

INJUNCTION.

GRAND LARCENY.

See Criminal Law.

GUARANTY.

See Sales, 3, 4, 5.

GUARDIANS AD LITEM.

See Probate Proceedings, 7.

HARMLESS ERROR.

See Criminal Law, 8, 9, 14, 15, 68, 81; Instructions, 5, 7, 29, 53, 55, 65; Contracts, 6; Eminent Domain, 1, 18; Claim and Delivery, 5.

HIGHWAYS.

See Telephones.

IMPEACHMENT.

See Evidence, 28.

IMPLIED FINDINGS.

See Findings, 1, 2.

INFORMATION.

See Criminal Law, 16, 17, 18, 26, 27, 28, 47, 48, 49, 50, 71, 75.

INJUNCTION.

See, also, Contempt, 4, 5, 6.

Live Stock—Uninclosed Lands—Continued Trespasses.

1. While equity will not enjoin the commission of a trespass when there is an adequate remedy at law, yet where it appeared that the defendants willfully and repeatedly, though warned to desist, drove bands of sheep upon plaintiff's uninclosed land, thereby depasturing it and causing water necessary for plaintiff's cattle to be consumed, and threatened to continue such trespasses, and where the record on appeal showed that plaintiff's title to the land in question was not controverted, the trial court was justified in granting a temporary injunction in view of the probable impossibility of accurately estimating the damages in money and to prevent a multiplicity of suits, and its order refusing to dissolve it was correct.—*Musselshell Cattle Co. v. Woolfolk et al.*, 126.

Free County High Schools—Trustees—Taxation.

2. The complaint in an action by a taxpayer to enjoin the trustees of a free county high school—claimed to have been established contrary to law (Laws 1899, p. 59; Laws 1901, p. 6)—from presenting to the board of county commissioners an estimate of the tax rate required to raise the funds necessary for buildings, teachers and necessary apparatus, alleged that if permitted to certify such rate to the board of commissioners it would levy the same on all taxable property in the county which in effect would constitute a lien on such property including plaintiff's. *Held*, that a general demurrer was properly sustained in that it did not appear that the plaintiff was suffering or was about to

suffer any injury for which he had not an adequate remedy; that the action was prematurely brought, inasmuch as the commissioners had not assumed to levy the tax, and that if they should proceed to act, plaintiff would have a remedy by appeal to the district court.—*Morse v. Jacky et al.*, 165.

Water Rights—Jurisdiction—Due Process of Law.

3. *Held*, on *certiorari*, that the district court exceeded its jurisdiction in making an order, in a summary proceeding and with notice of less than twenty-four hours, which to all intents and purposes enjoined a person from interfering with certain water rights theretofore adjusted between various claimants in an action to which the person so enjoined was not a party; that, if a trespasser, injunction against him could only be had after a hearing in a regular action; and that the adjudication of his rights as made by the order was without due process of law.—*State ex rel. Pew v. District Court et al.*, 233.

Banks—Assessment—Collection—Tender.

4. Because a bank had not paid or offered to pay taxes upon moneys on hand and in transit, not assessed to it, the remedy of injunction to restrain the collection of taxes illegally levied upon other of its property, not subject to taxation, may not be denied it, since, an assessment by the proper officers being necessary to a tax and none having been made, there was nothing for it to pay or tender.—*Clark et al. v. Maher et al.*, 391.

INSOLVENCY.

See *Mortgages*, 7.

INSTRUCTIONS.

Criminal Law—Grand Larceny—Trial—Review.

1. In a prosecution for larceny, an instruction that, if it was possible for the jury upon the evidence to account for the taking of the property mentioned, upon any reasonable hypothesis other than the guilt of defendant, they should do so, and find the defendant not guilty, cannot be said to be appropriate to every case, and, where the evidence is not before the supreme court on appeal, the refusal of the trial court to give such instruction will not be reviewed.—*State v. Kremer*, 6.

Criminal Law—Larceny—Reasonable Doubt.

2. The refusal of the trial court, in a prosecution for larceny, to give a requested instruction to the effect that the state must prove every material allegation of the information beyond a reasonable doubt, did not constitute error where the same subject had been covered by numerous instructions given by the court, though in different language from that found in the offered instruction.—*State v. Kremer*, 6.

Criminal Law—Jury.

3. A requested instruction in a criminal prosecution that the jury should not consider their personal opinions as to the facts proven, and that they might believe as men that certain facts exist, but as jurors they could only act upon the evidence introduced upon the trial, and from that and that alone they should form their verdict, unaided, unassisted and uninfluenced by any opinion or presumption not framed upon the testimony, was properly refused.—*State v. Kremer*, 6.

Criminal Law—Homicide—Defining Malice.

4. A definition of "malice" in an instruction, not precisely conforming to Penal Code, section 7, but nevertheless sufficiently comprehensive to give the jury a definite idea of the meaning of the word, was not a cause for reversal, in the absence of a request for a more specific instruction.—State v. Fuller, 12.

Homicide—"Heat of Passion"—Harmless Error.

5. Alleged error in an instruction in defining the expression "heat of passion" was harmless, where the jury found defendant guilty of murder in the first degree, and where the evidence did not tend to show a case of manslaughter.—State v. Fuller, 12.

To be Taken Together.

6. In construing instructions to the jury the whole charge should be taken together.—State v. Fuller, 12.

Criminal Law—Credibility of Witnesses—Harmless Error.

7. An instruction, in a prosecution for murder, which informed the jury that if they found that any witness had willfully and deliberately testified falsely as to any material fact in the case, they were at liberty to disregard his entire testimony, while in a subsequent sentence in the same paragraph the law was stated correctly; that such testimony could only be ignored in case no other corroborative evidence entitled to credit had been produced—though conflicting and erroneous, was not cause for reversal where it was not apparent that the jury were misled and where the verdict of guilty was obviously correct.—State v. Fuller, 12.

Criminal Law—Failure of Defendant to Testify.

8. In a prosecution for murder, where the defendant had not been sworn as a witness, it was proper for the court, if it saw fit so to do, to instruct the jury that the defendant in a criminal proceeding cannot be compelled to be a witness against himself, and that if he does not testify this fact must not be used to his prejudice.—State v. Fuller, 12.

Criminal Law—Homicide—Commenting on Evidence.

9. An instruction requested by defendant, accused of homicide, that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, "affords a strong presumption of innocence," was properly refused, it being misleading and an invasion of the province of the jury. State v. Lu Sing, 31.

Criminal Law—Homicide—Trial—Witnesses—Credibility.

10. In a prosecution for murder, it was error for the district court to refuse to charge the jury that in determining the weight to be given to the testimony of witnesses, the jury had a right to consider their appearance on the stand, their manner of testifying, their apparent candor or lack of it, their apparent fairness and means of knowledge, together with all the facts and circumstances in the evidence; and such error was not cured by submitting, in place of the requested instruction, the language of section 3123 of the Code of Civil Procedure, supplemented by the words, that they were at liberty to disregard the testimony of any witness who had willfully and deliberately testified falsely to any material matter, unless corroborated.—State v. Beckskove, 41.

Criminal Law—Appeal—Briefs—Review.

11. Where the brief of appellant in a criminal case fails to comply with Rule X, subsection 3b, providing that, where error is alleged in

the charge of the court, the instructions given or refused shall be set out in the specifications *in totidem verbis*, errors so assigned will not be considered.—State v. Morrison, 75.

Criminal Law—Review—Invited Error.

12. Errors in instructions given at the request of the defendant in a criminal case may not be complained of by him on appeal.—State v. Morrison, 75.

Trial—Request to Make More Definite—Appeal.

13. Where appellant failed to request that an instruction be given setting forth fully the issues to be determined in a personal injury case, he may not complain of one which defined them in very general terms.—Hardesty v. Largey Lumber Co., 151.

Commenting on Evidence—Appeal.

14. An instruction commenting on the evidence was properly refused. Hardesty v. Largey Lumber Co., 151.

Master and Servant—Personal Injuries—Statutes.

15. Held, that sections 2660, 2661, and 2662 of the Civil Code, each of which refers to the "Obligations of the Employer"—the title of the Article comprising the sections—are directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment; and that instructions given in such an action embodying these sections were properly submitted.—Hardesty v. Largey Lumber Co., 151.

Master and Servant—Personal Injuries—Railroads—Contributory Negligence.

16. An instruction, in an action for personal injuries brought by a brakeman who was struck by a low bridge while performing his duties as such, which announced the principle that the servant, with knowledge of an existing danger, may be excused from what would otherwise be contributory negligence, if it appeared that an emergency arose by reason of which, while engrossed in the performance of his duties, he forgot the danger or did not appreciate his close proximity to it, was properly given, the testimony showing that plaintiff was injured while endeavoring to release a defective brake after the train had started, and that his attention was absorbed by his duties for the time being.—Anderson v. Northern Pac. Ry. Co. et al., 181.

Appeal—Invited Error.

17. Where the district court, at the request of appellant, gave an instruction announcing an erroneous rule of law, but amended it in a particular which did not make it any more erroneous, the appellant may not complain.—Anderson v. Northern Pac. Ry. Co. et al., 181.

Master and Servant—Railroads—Low Bridges—Duty of Master.

18. An instruction—in an action for personal injuries against a smelting company jointly with a railway company, by a brakeman who, while on cars which were being taken from the smelter over a spur track, was struck by a bridge constructed over the track and maintained by the smelting company—to the effect that if the employees of the railway company were taking out the cars from the smelter at the invitation, express or implied, of the smelting company, it owed to them the duty to keep the premises, as far as the bridge was concerned, in a reasonably safe condition, a violation of which would render it liable, states a correct rule of law.—Anderson v. Northern Pac. Ry. Co. et al., 181.

Master and Servant—Railroads—Low Bridges—Negligence—Question for Jury—Instructions.

19. Whether the construction and maintenance of a bridge by a smelting company, jointly sued with a railway company, over a spur track so low as to cause a brakeman while performing his duties to be injured by coming in contact with it, constituted negligence on the part of the defendant smelting company, was a question for the jury, even though the bridge had a draw which could be removed and so rendered harmless; and a requested instruction charging, as a matter of law, that under such circumstances verdict should be for defendant smelting company, was properly refused.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

District Courts—Requested Instructions—Refusal to Correct.

20. The district court is not bound to correct a requested instruction by striking out a sentence announcing an erroneous rule of law and then to give it as corrected; while it may do so, error cannot be predicated upon its refusal.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Money Paid—Liability of Defendant.

21. In an action to recover a sum of money alleged to have been paid by plaintiff for the use and benefit of defendant in the purchase of certain stock, a requested instruction that if the jury believed that the plaintiff had purchased the stock for defendant, the latter was bound to pay for it, was erroneous, since, in order to fasten liability upon him, a request, express or implied, on his part, for such purchase must have been shown.—*Donovan-McCormick Co. v. Sparr*, 237.

Master and Servant—Personal Injuries—Railroads—Duty of Master.

22. Where, in an action for personal injuries, instructions relative to the duty of a railway company to its employees were couched in such language that any one of a number of different conclusions might have been drawn by the jury, the supreme court will not say that they selected one substantially correct and rejected those which were erroneous.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Master and Servant—Contributory Negligence—Knowledge of Danger.

23. An instruction, in a suit for personal injuries, that it was incumbent upon defendant to show that plaintiff, a brakeman, injured by coming in contact with a bridge maintained over a railroad track, knew of the existence of the bridge before the defense of contributory negligence could become available, was erroneous in that, if a reasonably prudent man he ought to have known of the danger incident to the existence of the bridge, he was chargeable with such knowledge.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Master and Servant—Railroads—Assumption of Risk—Knowledge of Danger.

24. To charge the jury, in a personal injury case, that the plaintiff, a brakeman, injured by coming in contact with a bridge erected over a railway track, must have had actual knowledge of the fact that the bridge was so low that he could not safely pass under it while standing on the platform of a car, before the defense of assumption of risk could be said to be established was error, since he could not recover if, as a reasonably prudent man, he ought to have known and comprehended the danger.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Appeal—Record—Evidence.

25. In the absence of the evidence from the record on appeal, instructions, to be subject to review, must have been erroneous under any

conceivable state of facts presented at the trial.—Donovan-McCormick Co. v. Sparr, 237.

Money Paid—Issues.

26. The complaint, in an action for money paid, alleged that the plaintiff corporation purchased certain shares of stock for the defendant at his special instance and request and that he agreed to pay for them. Defendant interposed a general denial. The court submitted an instruction telling the jury, among other things, that a question for their determination was as to whether the plaintiff company had purchased the stock for itself. The record on appeal did not contain the evidence. *Held*, that the giving of this instruction did not present a new issue, because, under his general denial, the defendant might have presented evidence to show that the plaintiff had purchased the stock for its own use and benefit.—Donovan-McCormick Co. v. Sparr, 237.

District Courts—Theory of Case.

27. The district court, in charging the jury, may not disregard the theory of the case at issue entertained by either party.—Donovan-McCormick Co. v. Sparr, 237.

Money Paid—Burden of Proof—Proving Negative.

28. An instruction, given in an action to recover money alleged to have been paid for the use and benefit of defendant in the purchase of certain shares of stock, which told the jury that the burden of proving that it did not buy the stock on its own account was upon the plaintiff corporation, while not to be commended as a mode in which to present a question in controversy to the jury, may not be said, in the absence of the evidence from the record, to impose upon plaintiff any greater burden than that which would have been imposed had the jury been informed that the burden was upon plaintiff to show that the stock was purchased for defendant, since proof of either alternative disproved the other.—Donovan-McCormick Co. v. Sparr, 237.

Conflicting—When Harmless Error.

29. The giving of two conflicting instructions, one of which correctly stated the law while the other was erroneous, but in appellant's favor, does not constitute reversible error.—Donovan-McCormick Co. v. Sparr, 237.

Personal Injuries—Cities and Towns—Defective Sidewalks.

30. An instruction, given in an action to recover damages from a city for personal injuries alleged to have been sustained by reason of a defective sidewalk, telling the jury that it was the duty of the city to see to it that its streets and sidewalks are kept in a safe condition, and, failing in this, it becomes liable to persons injured by reason of such failure, was erroneous, in that it practically made the city an insurer of the safe condition of its streets and sidewalks, whereas it is only compelled to keep its thoroughfares in a reasonably safe and good condition for travel.—Martin v. City of Butte, 281.

Error—Prejudice—Presumptions.

31. In the absence of anything to show that prejudice could not reasonably have followed the giving of an erroneous instruction, and the error appearing, prejudice will be presumed.—Martin v. City of Butte, 281.

Brokers—Contracts—Construction.

32. Where the attendant facts and circumstances in the making of an agreement are resorted to as an aid to an understanding of it, no greater burden rests upon the promisor than to show by a pre-

ponderance of the evidence that the promisee understood it as he (the promisor) believed he understood it (Civil Code, sec. 2214); and instructions, submitted in an action to recover for services as brokers to sell real estate which advised the jury that plaintiffs' (promisees') right of recovery depended upon whether they understood the contract in question in a certain way, laid down an erroneous rule of law.—*Blankenship et al. v. Decker et al.*, 292.

Malicious Prosecution—Good Faith of Defendant.

33. Where the jury in an action for malicious prosecution were told in an instruction that if the defendant honestly believed the plaintiff guilty and acted upon such belief, and it was founded upon facts which would create a belief in a reasonable man that there was probability that the plaintiff had stolen the property in question, such instruction was as favorable to defendant as he could demand.—*Martin v. Corscadden*, 308.

Malicious Prosecution—Exemplary Damages.

34. Where, in an action for malicious prosecution, the court had previously repeatedly charged that plaintiff was required to establish both want of probable cause and malice, which the jury must find, or return a verdict for defendant, an instruction that in such action, where defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury may award punitive damages, was not objectionable as withdrawing the element of want of probable cause from the jury.—*Martin v. Corscadden*, 308.

Malicious Prosecution—Probable Cause—Malice.

35. Where the court, in an action for malicious prosecution, had repeatedly and correctly instructed the jury on the questions of probable cause and malice, and defendant had failed to request further specific instructions relative thereto, he may not complain of those given.—*Martin v. Corscadden*, 308.

Request—Necessity.

36. Where appellant neglected to request the trial court to insert certain propositions of law alleged to have been favorable to him, in its instructions to the jury, he may not complain of their omission.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Mines—Master and Servant—Personal Injuries.

37. An instruction given in an action for damages for personal injuries claimed to have been sustained by plaintiff, a miner, in falling from an unattached ladder leading into a mine,—which charged the jury that if the injury arose out of the "obvious and ordinary" risks and dangers assumed by plaintiff in entering defendant's employ, recovery could not be had,—was proper, even though defendant's answer did not aver that the risks were ordinary ones, but where evidence had been introduced in its behalf, without objection, to support such theory and where the whole case had been tried on this theory of the defense.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Mines—Master and Servant—Personal Injuries.

38. An instruction submitted to the jury in a personal injury case that plaintiff, a miner, injured while descending into a mine on an unattached ladder, was bound to ascertain whether the ladder was loose or not, and that "his duty would not permit him to blindly venture upon it without investigation," is not open to the objection that it virtually made it the duty of the employee to act as an inspector, or investigator of appliances in the mine, since it simply announced

that it was his duty to use ordinary care—common sense—to see or feel where and how the ladder was before venturing upon it.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Criminal Law—Larceny—Felonious Intent.

39. An instruction given in a prosecution for grand larceny defining that crime substantially in the words of the statute, but omitting to supplement such definition by a statement that the taking of the property by defendant must have been done with a felonious intent was erroneous, and the casual use of the term “felonious” in a subsequent paragraph of the charge to the effect that the defendant should be acquitted if the jury were not satisfied that he “had something to do with the felonious taking of the property” did not cure the defect.—*State v. Allen*, 403.

Criminal Law—Contradictions—Invasion of Province of Jury.

40. While the jury may inquire whether contradictions in a witness’ testimony are only apparent or due to lapse of memory or the like, or to willful perjury, and determine its weight accordingly, it is error in a criminal case to instruct them that “prominent and striking” contradictions should be attributed to deliberate perjury rather than to the ordinary infirmities of mankind, in that such a statement invades the province of the jury.—*State v. Allen*, 403.

Criminal Law—Witnesses—Invasion of Province of Jury.

41. An instruction submitted to the jury in a criminal prosecution, that where witnesses to the same transaction perfectly and entirely agree on all points connected with it, a suspicion of practice and concert is engendered and should to this extent be discredited, is an invasion of the province of the jury and erroneous.—*State v. Allen*, 403.

Criminal Law—Circumstantial Evidence—Value.

42. The trial court in charging the jury in a criminal case as to the value to be given to circumstantial evidence, should include a statement that conviction should follow only if the circumstances are such as to satisfy their minds of defendant’s guilt beyond a reasonable doubt to the exclusion of every other reasonable hypothesis, and should not instruct that they should convict if such evidence convinces their “guarded judgment.”—*State v. Allen*, 403.

Criminal Law—Circumstantial Evidence—Invasion of Province of Jury.

43. *Semble*: It would seem that an instruction in a criminal prosecution that circumstantial evidence is in many cases quite as convincing as direct and positive evidence, is subject to the criticism that it comments on the weight of the evidence and invades the province of the jury.—*State v. Allen*, 403.

Criminal Law—Assumption of Facts—Principal—Accomplice.

44. For the district court to assume, in a criminal prosecution, in its charge to the jury, that a certain person was an accomplice of the defendant, was an assumption of the defendant’s guilt of the crime charged and erroneous, since it implied that a crime had been committed and that there was a principal.—*State v. Allen*, 403.

Criminal Law—Definition of Principal.

45. An instruction submitted in a prosecution for grand larceny, that a person who “advised or encouraged” another in the commission of a crime is to be considered a principal instead of “advised and encouraged,” the words used in section 41 of the Penal Code in defining the term “principal,” was not prejudicially erroneous, the words “advised” and “encouraged” being synonymous in popular meaning.—*State v. Allen*, 403.

Criminal Law—Definition of Principal.

46. *Held*, in a criminal appeal, that the use of the disjunctive "or" in defining a principal as one who "aids or abets" in the commission of a crime instead of the conjunctive "and," as prescribed by Penal Code, section 41, was erroneous, because the word "aid" does not imply guilty knowledge or felonious intent, while the term "abet" does include knowledge of the wrongful purpose of the perpetrator of, and counsel and encouragement in, the crime.—State v. Allen, 403.

Criminal Law—Larceny—Duty of Finder of Property.

47. Where in a prosecution for grand larceny no facts or circumstances are proven justifying the inference that the property alleged to have been stolen had been found by defendant or anyone else, an instruction as to the duty of a person finding property to restore it to the owner or to make a reasonable effort to do so is inapplicable and should not be given.—State v. Allen, 403.

Criminal Law—Definition of Crime.

48. An instruction embodying the provisions of sections 20 and 21 of the Penal Code upon the presence of joint operation of act and intent in order to constitute a crime, should be given in every criminal prosecution, especially when requested by defendant.—State v. Allen, 403.

Where Refusal not Error.

49. Where requested instructions are fairly covered by those given, a refusal of those asked is not error.—State v. Allen, 403.

Homicide—To be Read as a Whole—"Malice Aforethought."

50. Where the jury, on a trial for murder, had been clearly and carefully instructed as to all grades of unlawful homicide, and, also, as to what constitutes justifiable homicide, and that defendant could not be convicted of murder of the first degree unless it appeared from the evidence beyond a reasonable doubt that all the necessary elements including "malice aforethought" were present, the omission of that term in a subsequent paragraph of the charge,—which dealt with the proposition that it was not necessary that the unlawful design to take life should have been entertained for any precise length of time, and that if done in furtherance of such design and without lawful excuse "as explained in these instructions," they should convict the defendant of murder of the first degree,—was not prejudicial or misleading, since the whole charge, when read and construed together, was a correct exposition of the law and not inconsistent or conflicting.—State v. Houk, 418.

Homicide—Malice Aforethought.

51. Defendant having been convicted of murder of the second degree, the omission of the term "malice aforethought" in an instruction dealing with murder of the first degree, after all grades of unlawful homicide had been correctly defined in preceding paragraphs of the charge, could not have misled the jury to his prejudice.—State v. Houk, 418.

Homicide—Self-defense—Reasonable Person Standard.

52. Where the trial court, in a prosecution for murder, instructed the jury that the right of self-defense was to be measured by what a reasonable person would have done under like or the same circumstances, the charge conformed to the requirements of section 361 of the Penal Code and was sufficient.—State v. Houk, 418.

Homicide—"Beyond All Reasonable Doubt"—Omission.

53. Where the jury had been repeatedly instructed that they could not find defendant guilty of homicide unless the evidence established his guilt beyond all reasonable doubt, the omission of the words "beyond a reasonable doubt" in that part of the charge which stated that if "from the evidence," they found that accused, at the time he shot decedent, did not, as a reasonable man, believe that he was in imminent danger of losing his life, the killing was not in self-defense, did not constitute prejudicial error as leading the jury to believe that a verdict of guilty could be found on a mere preponderance of the evidence.—*State v. Houk*, 418.

Appeal—Briefs—Rules.

54. Instructions of which complaint is made by appellant, but which are not set out in his brief *totidem verbis*, as required by Rule X, paragraph 3, subdivision b, of the Rules of the Supreme Court, will not be reviewed.—*State v. Newman*, 434.

Naming Witnesses—When not Reversible Error.

55. In an action against a notary for damages for falsely certifying to an acknowledgment of a mortgage, the testimony taken at a former trial of the cause was introduced to impeach plaintiff and his wife. Their statements on the second trial in certain respects were in direct conflict with those made at the first trial. The only other witness at the second hearing who had also testified at the first admitted the correctness of his former testimony and gave none contrary thereto. The court instructed the jury that in determining the weight to be given to the testimony of plaintiff and his wife they could consider their statements made at the first trial, if they should find that such prior testimony had been given. *Held*, that while a court should not in any case designate a witness by name in its instructions, in this instance prejudice to appellant (plaintiff) could not have been worked, because, even if the witnesses had not been particularly designated, the instruction could not have been understood as being applicable to anyone but plaintiff and his wife.—*Mahoney v. Dixon et al.*, 454.

Master and Servant—Personal Injuries—"Obviously" Dangerous Mode of Doing Work.

56. An instruction given in an action against a building contractor for personal injuries to one of his employees, who had been directed to do certain work without being told in what mode to do it, and in doing it was injured, to the effect that where two ways are open to an employee of performing a duty, one of which is *obviously* dangerous and the other safe, and he knowingly and voluntarily or through negligent ignorance selects the dangerous one, thereby bringing upon himself an injury which probably would not have befallen him had he selected the other one, he cannot recover, but contributory negligence will be imputed to him as a matter of law, was not made erroneous by the use of the word "obviously" before the word "dangerous."—*Johnson v. Malette*, 477.

Eminent Domain—Damages—Interest—Judgment Must Conform to Verdict.

57. In a proceeding for the condemnation of a right of way across a mining claim for street railway purposes, the court instructed the jury that the compensation and damages to be assessed should be deemed to have accrued at the date of the summons, etc., and also that interest should be allowed upon the amount found by them from the day plaintiff took possession of the premises. The jury found

the "total amount" to be awarded to defendants to be twelve hundred dollars. The court in entering judgment added interest on that amount. *Held*, under section 1102 of the Code of Civil Procedure, that in entering judgment it was the duty of the court to follow the verdict, and that the allowance of interest by it was error, the verdict indicating that the jury had followed the instruction and made all allowances, including interest, to which they thought defendants entitled.—*Butte Electric Ry. Co. v. Mathews et al.*, 487.

Conversion—Notes—Mortgages—Consideration—Burden of Proof.

58. An instruction, given in an action to recover damages for the conversion of certain personal property seized by defendant constable, that a note secured by a mortgage imported a valuable consideration, and that the burden of showing the want of consideration rested upon the party seeking to invalidate it, correctly stated the law, even though the mortgage was given to secure an antecedent debt.—*Borden v. Lynch*, 503.

Conversion—Mortgages—Insolvency.

59. The fact that a chattel mortgagor was insolvent at the time she executed a mortgage on property in controversy in an action for damages for conversion did not of itself render the transaction fraudulent and void as against an attaching creditor, since an insolvent person may lawfully pledge his property to obtain loans or to secure an antecedent debt; and an instruction telling the jury, in substance, that, if they found that the mortgage was supported by a valid consideration and given in good faith to secure a debt actually due, the fact that the mortgagor was insolvent at the time she gave the mortgage was not presumptive proof of its fraudulent character, was correct.—*Borden v. Lynch*, 503.

Claim and Delivery—Measure of Damages.

60. To instruct the jury, in an action in claim and delivery, to recover possession of horses, wagons, etc., with damages for the wrongful detention of the same, that the measure of damages in such a case is "the value of the use of the property taken, from the time of the taking of the same up to the present time," is error, since it fails to submit to the jury the proposition that from the gross earnings of the property in controversy the expense of feeding and taking care of it must be deducted, actual damages being all that may be recovered.—*Haggerty Bros. v. Lash & Shaughnessy*, 517.

Claim and Delivery—Damages—Burden of Proof.

61. In an action in claim and delivery to recover the possession of horses, wagons, etc., plaintiff's title to which was denied and damages asked by defendants for a wrongful taking of the property by plaintiff, an instruction requested by the latter, that "a party who claims compensation for an alleged wrong done must show not only that he has suffered a loss on account of the injury, but also what was the amount of the loss, and the burden of proving these things is upon the party alleging the wrong," correctly stated the law, was applicable to the issues made and should have been given.—*Haggerty Bros. v. Lash & Shaughnessy*, 517.

Personal Injuries—Cities and Towns—Defective Sidewalks.

62. An instruction, given in an action to recover damages for personal injuries claimed to have been sustained by plaintiff by reason of a fall into an excavation next to a sidewalk, negligently left unguarded by the defendant city, that the jury could, in fixing the damages, take into consideration "any pain or suffering which he (plaintiff)

has endured, as a result of any injury which he has sustained, *up to the present time*," etc., was not open to the objection that it directed the jury to compensate plaintiff for any injury sustained prior to the time of the trial, whether through the negligence of defendant or not, where the evidence was all directed to the injury alleged in the complaint and to no other; and the jury, therefore, must have understood that the clause "up to the present time" had reference to the pain and suffering endured and not to the injury.—*Kelly v. City of Butte*, 530.

Eminent Domain—Award of Commissioners—Evidence.

63. An instruction, given by the district court in a proceeding looking to the condemnation of land for a railroad right of way, that the jury in arriving at a verdict should not consider the award theretofore made by the commissioners appointed to assess the damages, but should confine themselves exclusively to the testimony of the witnesses examined at the hearing before them, was a correct statement of the law, where the award formerly made by the commissioners had not been introduced in evidence and where the only reference made to it had been during the cross-examination of two of the commissioners, as to the amounts fixed by them in their award, which agreed with those fixed by them at the trial.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Claim and Delivery—Assumption of Facts—Mortgages—Transfer—Notice.

64. Instructions requested by defendants in an action in claim and delivery, that unless one of the defendants, as assignee of a chattel mortgage, had notice or knowledge of a prior mortgage to plaintiff's assignor, the verdict should be for defendants, and that the burden of proof is on the plaintiff to establish the fact that such defendant had notice of the prior mortgage, contained an assumption that the defendant had paid value therefor, a fact directly in issue, and were properly refused by the court.—*Lindsley v. McGrath*, 564.

Robbery—Credibility of Witnesses—Harmless Error.

65. An instruction, given in a prosecution for robbery, which in effect told the jury that they were the exclusive judges of the credibility of the witnesses and had the right to reject all the testimony of any witness who in their opinion had been guilty of willful perjury "unless on any point such testimony is corroborated," could not have been understood by them otherwise than as a direction that they were not bound to accept any part of the statement as true, but that they were still at liberty to believe it or not as their judgment dictated, and could not be said to imply that if they found such testimony corroborated in any respect they should for that reason deem it credible. The instruction, while not technically correct, was not prejudicially erroneous. (Mr. Justice Milburn, dissenting.)—*State v. Lee*, 584.

Robbery—Codefendants.

66. Where two defendants were informed against jointly for the crime of robbery, each claiming a separate trial, an instruction requested on the trial of one of them, that if the jury found that he or his confederate, or either of them, did not take any property from the possession of the complaining witness, they must find defendant not guilty, was properly refused, in that he was not entitled to an acquittal merely because his confederate had not taken any of the property in question.—*State v. Lee*, 584.

INSURANCE.

See Life Insurance.

INTEREST.

See, also, Eminent Domain, 2.

Action for Recovery of Money—Judgment.

1. *Obiter*: If the jury in an action for the recovery of money should find, under section 1102 of the Code of Civil Procedure, the amount to which defendant is entitled, and specify in the verdict that the amount so found should draw interest from a certain date, the court may compute such interest and include it in the judgment upon the principle that that which can be made certain must be regarded as certain.—Butte Electric Ry. Co. v. Mathews et al., 487.

INTOXICATING LIQUORS.

See Licenses, 1, 2, 3.

INTOXICATION.

See Criminal Law, 38, 41.

JUDGMENT-ROLL.

See, also, Probate Proceedings, 17, 18, 19.

Civil Actions—Appeal—Records—Bill of Exceptions.

1. *Obiter*: The judgment-roll in a civil case may not be brought to the supreme court on appeal in the body of a bill of exceptions.—State v. Morrison, 75.

Judgment on Pleadings—Dismissal—Effect—New Action—Presumptions.

2. Where the district court entered judgment on the pleadings in favor of defendant in a suit for money had and received, upon the presumption that a judgment of dismissal in a former suit on the same cause of action had been rendered on the merits and that, therefore, the second action was barred, the judgment-roll in the first action not being before the court at the time, it erred in that, under section 1007 of the Code of Civil Procedure, a judgment of dismissal is not a bar to a new action unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment-roll.—Glass et al. v. Basin & Bay State M. Co., 88.

Amendments—Continuance.

3. Under sections 1151 and 1196 of the Code of Civil Procedure, an order permitting an amendment to the complaint and refusing a continuance, after the jury had been sworn, is a part of the judgment-roll.—Lynch v. Borden, 503.

JUDGMENTS.

On Pleadings—Dismissal—Effect—New Action.

1. Where the district court entered judgment on the pleadings in favor of defendant in a suit for money had and received, upon the presumption that a judgment of dismissal in a former suit on the same cause of action had been rendered on the merits, and that, therefore, the second action was barred, the judgment-roll in the first action not being before the court at the time, it erred in that, under section 1007 of the Code of Civil Procedure, a judgment of dismissal is not a bar to a new action unless rendered on the merits, which fact must

be expressly declared upon the face of the judgment or appear from the judgment-roll.—*Glass et al. v. Basin & Bay State M. Co.*, 88.

Of Dismissal—Affirmance—New Action—Limitations.

2. Where, in a suit for money had and received, a judgment of dismissal on the pleadings had been affirmed on appeal, it was terminated by such affirmance in a manner other than those mentioned in section 547 of the Code of Civil Procedure, and a second suit on the same cause of action, brought within a year after such termination, was not barred.—*Glass et al. v. Basin & Bay State M. Co.*, 88.

Probate Proceedings.

3. A judgment in probate proceedings is a judgment *in rem*.—*State ex rel. Ruef v. District Court et al.*, 96.

Mines—Adverse Suits.

4. *Obiter*: Inasmuch as the federal government is a *quasi* party to adverse suits to mining claims, where it appears that neither party is entitled to patent, judgment should be rendered to that effect.—*Helena Gold & Iron Co. v. Baggaley*, 464.

Eminent Domain—Damages—Interest—Must Conform to Verdict.

5. In a proceeding for the condemnation of a right of way across a mining claim for street railway purposes, the court instructed the jury that the compensation and damages to be assessed should be deemed to have accrued at the date of the summons, etc., and also that interest should be allowed upon the amount found by them from the day plaintiff took possession of the premises. The jury found the "total amount" to be awarded to defendants to be twelve hundred dollars. The court, in entering judgment, added interest on that amount. *Held*, under section 1102 of the Code of Civil Procedure, that in entering judgment it was the duty of the court to follow the verdict, and that the allowance of interest by it was error, the verdict indicating that the jury had followed the instruction and made all allowances, including interest, to which they thought defendants entitled.—*Butte Electric Ry. Co. v. Mathews et al.*, 487.

Action for Recovery of Money—Interest.

6. *Obiter*: If the jury in an action for the recovery of money should find, under section 1102 of the Code of Civil Procedure, the amount to which defendant is entitled, and specify in the verdict that the amount so found should draw interest from a certain date, the court may compute such interest and include it in the judgment upon the principle that that which can be made certain must be regarded as certain.—*Butte Electric Ry. Co. v. Mathews et al.*, 487.

JUDICIAL NOTICE.

District Courts—Terms.

1. Judicial notice will be taken by the supreme court of the fact that there are two or more counties in a certain judicial district in this state, that such district court has fixed terms, expiring at certain periods, and that the court is not open for the transaction of business at all times as in a district embracing one county only.—*State v. Lu Sing*, 31.

District Courts—Rules.

2. The supreme court will not take judicial notice of the provisions of rules of the district court.—*Bowen v. Webb*, 61.

District Courts—Constitutional Amendments—Evidence.

3. While, as a general rule, a court may take testimony to refresh its memory on matters of which it is required to take judicial notice, it
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should not do so,—on motion to quash an alternative writ of mandate,—for the purpose of informing itself of the regularity of the adoption of a constitutional amendment, where by reason of a proclamation of the governor declaring the amendment to have been adopted, the amendment was *prima facie* a law, of which fact the court was sufficiently informed.—State ex rel. Teague v. Board of Commissioners et al., 426.

JUDICIAL DISTRICTS.

See Contempt, 4; Judicial Notice, 1.

JURY.

Argument to, see Attorneys, 10, 11.

Misconduct, see New Trial, 2.

Reading law to, see Attorneys, 10, 11.

Challenge to Panel—Witnesses—District Judges.

1. *Obiter*: A judge of the district court may be called as a witness when the regularity of the drawing of a jury in a criminal prosecution is questioned by a challenge to the panel, inasmuch as he orders such drawing and directs the clerk during its progress (Code Civ. Proc., sec. 261), and under Penal Code, section 2038, both judicial and ministerial officers whose irregularity is complained of, may be called upon to testify.—State ex rel. Breen v. District Court et al., 106.

JUSTICES OF THE PEACE.

Appeal—Final Judgment—Appealable Orders.

1. An order of the district court dismissing an appeal from a justice's court is not a final judgment from which an appeal lies, nor is it an appealable order under Code of Civil Procedure, section 1722, as amended by Laws of 1899, page 146.—Palmer v. Spaulding, 1.

Prohibition—Appeal—Requisites—Statutes—Jurisdiction.

2. A notice of appeal from a justice of the peace to the district court was served on counsel for the opposite party on one day and not filed in the justice's court until three days later. A motion to dismiss the appeal on the ground that it had not been filed and served in accordance with the provisions of Code of Civil Procedure, section 1760, was overruled by the district court. *Held*, on application for writ of prohibition, that under this section the filing of the notice in the justice's court must precede, or be contemporaneous with, the service thereof on the adverse party or his counsel, and that by the failure of the appellant to observe the mandate of this section the district court was not invested with jurisdiction of the cause.—State ex rel. Hall et al. v. District Court et al., 112.

LABOR.

See Eight-hour Law.

LAND DEPARTMENT.

See Public Lands.

LARCENY.

See Criminal Law, 4, 7, 50-64.

LEGISLATION.

Arbitrary, see Eight-hour Law, 3.

Policy, see Eight-hour Law, 4.

See, also, Statutes and Statutory Construction.

LICENSES.

Mandamus—County Treasurers—Intoxicating Liquors.

1. *Mandamus* does not lie to compel a county treasurer to issue a license to a liquor dealer who, after the expiration of a license obtained under Chapter 82 of the Session Laws of 1905, page 174, tendered the necessary license fee and demanded that a new license be issued to him to carry on the business at the same place for the ensuing six months, his contention that, having once had favorable action on his petition for such a license by the board of county commissioners, he was not required thereafter at any time to present a new petition signed by the requisite number of resident freeholders, and that therefore it was the duty of the county treasurer to issue a new license on demand, being untenable.—State ex rel. Bray v. Settles, County Treasurer, 448.

Intoxicating Liquors—Legislative Regulations.

2. The legislature, in regulating the sale of intoxicating liquors, may impose any restrictions it may deem proper upon those engaged in such business, and the argument of inconvenience will not avail so long as any such regulation bears equally upon all persons falling in his particular class.—State ex rel. Bray v. Settles, County Treasurer, 448.

Intoxicating Liquors—Statutes—Constitutional Objections.

3. Chapter 82, Session Laws of 1905, page 174, is not obnoxious to constitutional principles, in that it grants to the board of county commissioners authority to act capriciously in the matter of granting or refusing licenses to sell intoxicating liquors, the discretion in that Act conferred upon them being a fair administrative one, and the mere fact that the power vested in them may be abused being no valid objection to the legislation.—State ex rel. Bray v. Settles, County Treasurer, 448.

LIFE INSURANCE.

Mutual Benefit Associations—Change of Beneficiary.

1. A member of a benefit life insurance association has a right to change the beneficiary named in his certificate of insurance, by complying with the by-laws of the association governing the subject.—Knights of Maccabees of the World v. Sackett, 357.

Same—By-laws—Waiver.

2. Any waiver of a strict compliance with the by-laws of a benefit life insurance association governing a change of beneficiary, must have occurred during the lifetime of the insured, and when so waived the former beneficiary upon the death of the insured cannot take advantage of a noncompliance with the rules covering the matter.—Knights of Maccabees of the World v. Sackett, 357.

Payment of Insurance Money into Court—Effect.

3. By paying into court the money due on a life insurance policy issued by a fraternal benefit association, the association waived the failure of insured to comply strictly with the by-laws of the order governing a change of beneficiary, but such waiver could not impair rights of the beneficiary which became vested on the death of the insured.—Knights of Maccabees of the World v. Sackett, 357.

Change of Beneficiary—Requirements.

4. With respect to mutual benefit insurance, it is a general rule that in making a change of beneficiary, the insured must proceed in accordance with the regulations contained in the policy and by-laws of the association, and any material deviation from the course therein indicated will invalidate the transfer.—*Knights of Maccabees of the World v. Sackett*, 357.

Change of Beneficiary—Mailing—Agency.

5. The by-laws of a fraternal life insurance association provided that a change of beneficiary should take effect upon delivery to the local record-keeper of a written request for such change. The insured placed his written request for change of beneficiary in the mail for delivery into the postoffice of the place where the record-keeper resided. Before delivery, insured died. *Held*, that by depositing the paper in the mail the insured constituted it his agent and assumed the risk of failure of delivery, or that it would not be made until a date too late to be of any effect, that the failure of the agent was his failure, and that therefore the contemplated change was not effectuated.—*Knights of Maccabees of the World v. Sackett*, 357.

Change of Beneficiary—Receipt of Application After Death of Insured—Effect.

6. The fact that a written request for a change of beneficiary in a policy of insurance issued by a mutual benefit association, the by-laws of which provided that such change should take effect only upon delivery to the local record-keeper of a request in writing therefor, had been placed in the mail for delivery and was actually received within about six hours after the death of the insured, could not affect the interest of the beneficiary named in the policy, whose title to the amount called for in it attached instantly upon the death of the insured.—*Knights of Maccabees of the World v. Sackett*, 357.

Change of Beneficiary—Receipt of Application After Death of Insured—Equity.

7. *Held*, that the doctrine that a court of equity will decree that to be done which ought to be done, did not apply where a member of a benefit life insurance association had, in an attempt to comply with its by-laws relative to a change of beneficiary, placed a written request for such change in the mail but, before delivery thereof in the postoffice of the place of residence of the local keeper of records, the insured died, he, by failure of his agent to deliver the request in time, not having done all that was incumbent upon him to do to make the change effectual.—*Knights of Maccabees of the World v. Sackett*, 357.

LIMITATIONS.

See Statutes of Limitations.

LIVE STOCK.**Uninclosed Lands—Trespass.**

1. One who knowingly and willfully drives his stock upon uninclosed lands of another is guilty of a trespass and must respond in damages at the suit of the latter.—*Musselshell Cattle Co. v. Woolfolk et al.*, 126.

Uninclosed Lands—Continued Trespasses—Injunction.

2. While equity will not enjoin the commission of a trespass when there is an adequate remedy at law, yet where it appeared that the defendants willfully and repeatedly, though warned to desist, drove bands of sheep upon plaintiff's uninclosed land, thereby depasturing it and causing water necessary for plaintiff's cattle to be consumed,

and threatened to continue such trespasses, and where the record on appeal showed that plaintiff's title to the land in question was not controverted, the trial court was justified in granting a temporary injunction in view of the probable impossibility of accurately estimating the damages in money and to prevent a multiplicity of suits, and its order refusing to dissolve it was correct.—*Musselshell Cattle Co. v. Woolfolk et al.*, 126.

MALICIOUS PROSECUTION.

Evidence—Justice's Record.

1. Where, in an action for malicious prosecution, it appeared that plaintiff had been charged with larceny before a justice of the peace, a recital of the justice's docket, after the entry that defendant had been found not guilty and had been discharged, that, as there were no grounds for complaint, judgment was entered against the complaining witness, for costs, was inadmissible, whether offered as a prior adjudication of the issue on the trial or as an expression of the opinion of the justice thereon.—*Martin v. Corscadden*, 308.

Evidence—Reputation.

2. In an action for malicious prosecution, the justice before whom plaintiff had been tried and acquitted testified on cross-examination that he had permitted him to go at large on his promise to appear, and on re-examination, in answer to a question why he had not required bail, stated that he had "confidence" in plaintiff, and that his father had also guaranteed his appearance. *Held*, that, though such answer was immaterial, it was not prejudicial to defendant, as tending to establish plaintiff's good reputation in the community by the justice's personal opinion, his reputation not having been put in issue by plaintiff nor attacked by defendant.—*Martin v. Corscadden*, 308.

Probable Cause—Malice—Burden of Proof.

3. Where, in an action for malicious prosecution, the proof tends to show absence of probable cause, a *prima facie* case is made for the jury, and the burden then rests upon the defendant to rebut the same by evidence tending to show probable cause and want of malice on his part.—*Martin v. Corscadden*, 308.

Evidence—Actual Guilt of Plaintiff of Act Charged—Probable Cause.

4. Actual guilt on the part of plaintiff in an action for malicious prosecution must always be established by proof beyond a reasonable doubt, while probable cause may be shown by proof of such facts and circumstances as would lead a careful and conscientious man to believe that he was guilty.—*Martin v. Corscadden*, 308.

Probable Cause—Plaintiff's Guilt—General Report—Proof.

5. While mere reputation or the general report of plaintiff's guilt is not sufficient to establish probable cause, in an action for malicious prosecution, it is not necessary that the defendant should have seen and conversed with the witnesses to the act charged.—*Martin v. Corscadden*, 308.

Evidence—Reputation of Plaintiff—Probable Cause—Mitigation of Damages.

6. In an action for malicious prosecution, evidence of the previous bad reputation of plaintiff is admissible to rebut the proof of want of probable cause and in mitigation of damages.—*Martin v. Corscadden*, 308.

Evidence—Reputation—Specific Acts—Offer of Proof.

7. Evidence of specific acts of larceny, said to have been committed by plaintiff in an action for malicious prosecution, in another state and not known of in the community in which he resided except by defendant and one other, was not admissible to show the general reputation of plaintiff, and an offer of proof to that effect was properly excluded.—*Martin v. Corscadden*, 308.

Offer of Proof—Good Faith—Confession of Plaintiff.

8. An offer of proof, by defendant in an action for malicious prosecution, for the purpose of showing his good faith and the absence of malice, that plaintiff had confessed to witness about two years prior to his arrest that he had at one time boarded at a restaurant in another state, and had been in the habit of stealing articles of silverware from the restaurant and giving them to his relatives, all of which had been communicated to defendant prior to the commencement of the prosecution, was too indefinite, in that it did not show when the confessed larcenies were committed, nor that the defendant believed the confession to be true.—*Martin v. Corscadden*, 308.

Advice of Attorney—Defense—Instructions.

9. An instruction given in an action for malicious prosecution that if the defendant did not make a full, fair and honest statement of all the facts in his knowledge to his counsel and act upon the advice given him thereon, but acted upon a fixed determination of his own, then such advice could not avail him as a defense, correctly stated the law.—*Martin v. Corscadden*, 308.

Exemplary Damages—Pleadings—Complaint.

10. *Held*, under section 4290, Civil Code, that in order for plaintiff to recover punitive damages, in an action for malicious prosecution, in addition to those actually sustained, it is not necessary that he claim them, *eo nomine*, in his complaint.—*Martin v. Corscadden*, 308.

Instructions—Exemplary Damages.

11. Where, in an action for malicious prosecution, the court had previously repeatedly charged that plaintiff was required to establish both want of probable cause and malice, which the jury must find, or return a verdict for defendant, an instruction that in such action, where defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury may award punitive damages, was not objectionable as withdrawing the element of want of probable cause from the jury.—*Martin v. Corscadden*, 308.

Instructions—Probable Cause—Malice.

12. Where the court, in an action for malicious prosecution, had repeatedly and correctly instructed the jury on the questions of probable cause and malice, and defendant had failed to request further specific instructions relative thereto he may not complain of those given.—*Martin v. Corscadden*, 308.

Damages—Excessiveness.

13. Where plaintiff in an action for malicious prosecution had been wrongfully charged with the larceny of certain hogs, arrested, tried and acquitted, a verdict for \$550 was not excessive, even though plaintiff was not committed to jail or required to give bail.—*Martin v. Corscadden*, 308.

MANDAMUS.

See Counties, 1; Pleading and Practice, 15; Licenses, 1.

MASTER AND SERVANT.

See, also, Eight-hour Law.

Mines—Personal Injuries—Safe Place to Work—Nonsuit.

1. *Held*, in a suit for personal injuries, that the district court erred in sustaining a motion for nonsuit made at the close of plaintiff's case, where the evidence introduced tended to show, and for the purposes of the motion did prove, that plaintiff, a miner, had been injured by falling rock and that defendant had failed to keep the "place," already created and completed, in which plaintiff was at work, safe and secure. *Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Mines—Personal Injuries—Safe Place to Work—Assumption of Risk.

2. A miner does not assume the risks incident to his employment which flow from his employer's failure to exercise reasonable care to keep the "place," already created and completed, in which the former is at work, safe and secure.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Personal Injuries—Nonsuit—Negligence—*Res Ipsa Loquitur*.

3. Where, in an action for personal injuries, the evidence introduced by plaintiff tended to prove that while he was employed as a carpenter in the erection of a building, the master, through its vice-principal, not only had actual charge and control of the piling of certain lumber, through the falling of which plaintiff was injured, but actually directed the manner in which it should be piled and gave directions that particular pains in doing so should not be exercised; that cross-strips or ties should not be employed; that plaintiff was directed by the vice-principal to the very place where he was injured, and where it was self-evident that if properly piled the lumber would not have fallen of its own accord, the doctrine of *res ipsa loquitur* is applicable, so that a *prima facie* case of negligence on the part of defendant was made out, and a motion for nonsuit was therefore properly refused.—*Hardesty v. Largey Lumber Co.*, 151.

Personal Injuries—Negligence—Burden of Proof—Presumptions.

4. While the general rule of law is that negligence is not inferable from the mere occurrence of an accident, yet where the thing which causes the injury is shown to be under the management and control of defendant and that the accident is of such a nature as to make it apparent that, but for the failure of those in control to use proper care, it would not have happened, proof of the accident raises a presumption of defendant's negligence and casts upon him the burden of showing that ordinary care was exercised.—*Hardesty v. Largey Lumber Co.*, 151.

Personal Injuries—Vice-principal—Assumption of Risk—Question for Jury.

5. The question whether the danger from a pile of lumber, by the falling of which plaintiff was injured, was obvious and apparent to him, or equally as apparent to him as to defendant's vice-principal, under whose direction the lumber had been piled and who had directed plaintiff to work at the very place where the accident occurred, by reason of which knowledge plaintiff will be deemed to have assumed the risk incident to his employment, was one for the jury to determine.—*Hardesty v. Largey Lumber Co.*, 151.

Personal Injuries—Vice-principal—Fellow-servants.

6. *Held*, under *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582, that one who had actual charge and control of the piling of lumber used in the construction of a building for defendant company, and directed the piling to be done in a certain manner, and later ordered plaintiff, who was injured by the falling of such lumber, to work at the place

where the accident occurred, was defendant's vice-principal and not a fellow-servant of plaintiff.—*Hardesty v. Largey Lumber Co.*, 151.

Personal Injuries—Safe Place to Work—When Doctrine not Applicable.

7. The doctrine that, where a servant is creating a place in which to work, the master will not be liable if the former is injured while making such place, is not applicable where plaintiff, a carpenter, was directed to work in a particular place outside of a building in course of construction, and who while executing such order was injured by the falling of improperly piled lumber.—*Hardesty v. Largey Lumber Co.*, 151.

Personal Injuries—Statutes—Instructions.

8. *Held*, that sections 2660, 2661, and 2662 of the Civil Code, each of which refers to the "Obligations of the Employer"—the title of the article comprising the sections—are directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment; and that instructions given in such an action embodying these sections were properly submitted.—*Hardesty v. Largey Lumber Co.* (On rehearing), 151.

Personal Injuries—Railroads—Knowledge of Danger—Question for Jury.

9. The plaintiff, employed as a brakeman on a railroad, was injured, while engaged in the performance of his duties, by being struck by a bridge erected over a spur track. He had never been on this spur before. The bridge was about eight feet above the track. The platform of the gondola car on which he was standing was three and one-half or four feet above the track. Plaintiff was a man of five feet and ten inches in height. There were no telltales or other devices for warning employees of the railroad of their approach to the bridge. Plaintiff was struck while endeavoring to release a defective brake. *Held*, that the question whether plaintiff knew or ought to have known of the danger incident to riding under this bridge while standing on the platform of a car was a question for the jury; and that, therefore, a motion for nonsuit was properly overruled.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Railroads—Contributory Negligence—Instructions.

10. An instruction, in an action for personal injuries brought by a brakeman who was struck by a low bridge while performing his duties as such, which announced the principle that the servant, with knowledge of an existing danger, may be excused from what would otherwise be contributory negligence, if it appeared that an emergency arose by reason of which, while engrossed in the performance of his duties, he forgot the danger or did not appreciate his close proximity to it, was properly given, the testimony showing that plaintiff was injured while endeavoring to release a defective brake after the train had started, and that his attention was absorbed by his duties for the time being.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Assumption of Risk.

11. *Quære*: Is the doctrine that a servant, knowing of an existing danger, is excusable where he was injured while engrossed in the performance of his duties, by reason of an emergency which absorbs his whole attention, so that for the time being he forgets the danger or his close proximity to it, applicable against the defense of assumed risk?—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Railroads—Low Bridges—Duty of Master.

12. An instruction—in an action for personal injuries against a smelting company jointly with a railway company, by a brakeman who, while on cars which were being taken from the smelter over a spur track, was struck by a bridge constructed over the track and maintained by the smelting company—to the effect that if the employees of the railway company were taking out the cars from the smelter at the invitation, express or implied, of the smelting company, it owed to them the duty to keep the premises, as far as the bridge was concerned, in a reasonably safe condition, a violation of which would render it liable, states a correct rule of law.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Railroads—Low Bridges—Negligence—Question for Jury—Instructions.

13. Whether the construction and maintenance of a bridge by a smelting company, jointly sued with a railway company, over a spur track so low as to cause a brakeman while performing his duties to be injured by coming in contact with it, constituted negligence on the part of the defendant smelting company, was a question for the jury, even though the bridge had a draw which could be removed and so rendered harmless; and a requested instruction charging, as a matter of law, that under such circumstances verdict should be for defendant smelting company, was properly refused.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Railroads—Duty of Master—Instructions.

14. Where, in an action for personal injuries, instructions relative to the duty of a railway company to its employees were couched in such language that any one of a number of different conclusions might have been drawn by the jury, the supreme court will not say that they selected one substantially correct and rejected those which were erroneous.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Duty of Master to Servant—Railroads.

15. The duty which a railway company owes to its employees with respect to its roadway and appliances is to exercise ordinary care to furnish reasonably safe roadways and appliances, and to use ordinary care and diligence to keep them in a reasonably safe condition.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Instructions—Contributory Negligence—Knowledge of Danger.

16. An instruction, in a suit for personal injuries, that it was incumbent upon defendant to show that plaintiff, a brakeman, injured by coming in contact with a bridge maintained over a railroad track, knew of the existence of the bridge before the defense of contributory negligence could become available, was erroneous in that, if as a reasonably prudent man he ought to have known of the danger incident to the existence of the bridge, he was chargeable with such knowledge.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Personal Injuries—Railroads—Instructions—Assumption of Risk—Knowledge of Danger.

17. To charge the jury, in a personal injury case, that the plaintiff, a brakeman, injured by coming in contact with a bridge erected over a railway track, must have had actual knowledge of the fact that the bridge was so low that he could not safely pass under it while standing on the platform of a car, before the defense of assumption of risk could be said to be established, was error, since he could not recover

if, as a reasonably prudent man, he ought to have known and comprehended the danger.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Mines—Personal Injuries—Instructions.

18. An instruction given in an action for damages for personal injuries claimed to have been sustained by plaintiff, a miner, in falling from an unattached ladder leading into a mine—which charged the jury that if the injury arose out of the “obvious and ordinary” risks and dangers assumed by plaintiff in entering defendant’s employ, recovery could not be had—was proper, even though defendant’s answer did not aver that the risks were ordinary ones, but where evidence had been introduced in its behalf, without objection, to support such theory and where the whole case had been tried on this theory of the defense.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Mines—Personal Injuries—Instructions.

19. An instruction submitted to the jury in a personal injury case that plaintiff, a miner, injured while descending into a mine on an unattached ladder, was bound to ascertain whether the ladder was loose or not, and that “his duty would not permit him to blindly venture upon it without investigation,” is not open to the objection that it virtually made it the duty of the employee to act as an inspector, or investigator of appliances in the mine, since it simply announced that it was his duty to use ordinary care—common sense—to see or feel where and how the ladder was before venturing upon it.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Mines—Personal Injuries—Ordinary Care—Question for Jury.

20. The question whether a miner, injured while descending into a mine on an unattached ladder, used ordinary care in failing to satisfy himself where and how the ladder was, was one for the jury to determine.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Personal Injuries—Defective Appliances—Evidence—Review.

21. Evidence submitted in an action for personal injuries, alleged to have been sustained by plaintiff, a laborer, by reason of his employer’s negligence in directing him to work in an unsafe place and with defective appliances, reviewed and held sufficient to go to the jury.—*Johnson v. Malette*, 477.

Contributory Negligence—Servant Choosing Mode of Doing Work.

22. Where a laborer was directed by his employer to make certain alterations on an elevator without indicating the mode in which the work should be done, and the employee voluntarily selected one which was more dangerous than another method in which it might have been done, it must have appeared, in order to attribute contributory negligence to the employee as a matter of law, that the mode employed by him was known to him to be more dangerous, or its dangerous character must have been so obvious that he could be presumed to have known it.—*Johnson v. Malette*, 477.

Negligence of Employer in Giving General Directions.

23. An order by an employer to his employee to do certain work without pointing out the mode of doing it was equivalent to directing him to use such mode as to him (the employee) seemed most suitable; and where, in performing the work, the servant was injured, it was a question for the jury to say upon the evidence,—which tended to prove the allegations of the complaint that the injury was caused by reason of a defective appliance furnished by defendant employer and that the latter gave such direction,—whether the defendant was guilty of

negligence in supplying such faulty appliance and in giving the general direction to the employee he did give.—*Johnson v. Malette*, 477.

Instructions—"Obviously" Dangerous Mode of Doing Work.

24. An instruction given in an action against a building contractor for personal injuries to one of his employees, who had been directed to do certain work without being told in what mode to do it, and in doing it was injured, to the effect that where two ways are open to an employee of performing a duty, one of which is *obviously* dangerous and the other safe, and he knowingly and voluntarily or through negligent ignorance selects the dangerous one, thereby bringing upon himself an injury which probably would not have befallen him had he selected the other one, he cannot recover, but contributory negligence will be imputed to him as a matter of law, was not made erroneous by the use of the word "obviously" before the word "dangerous."—*Johnson v. Malette*, 477.

Personal Injuries—Patently Defective Machinery—Complaint—Sufficiency.

25. A complaint, in an action by an employee of a steam laundry for injuries claimed to have been sustained by plaintiff while working on a defective mangle, is not insufficient for failure to allege that the defect in the machine was known to defendant, where sufficient facts were set up to show that the defect was patent and not latent.—*Coulter v. Union Laundry Co.*, 590.

Statutory Liability of Master—Injuries to Servant—Defenses.

26. In an action for personal injuries alleged to have been sustained by plaintiff, a laundry employee, while working on a patently defective mangle, the evidence showed that she was twenty-one years of age, had worked for fourteen months in laundries, was familiar with the construction and operation of the machine, knew the defect in it and had not notified defendant of its defective condition, but continued in the employment until she was injured. Section 2662, Civil Code, makes an employer liable to his employee for losses caused by the former's want of ordinary care. *Held*, that this section, under such circumstances, did not preclude defendant from offering any defense, though he did not use ordinary care in furnishing ordinarily safe machinery.—*Coulter v. Union Laundry Co.*, 590

Injuries to Servant—Assumption of Risk—Nonsuit.

27. Where the evidence in an action for personal injuries sustained by an operator of a patently defective mangle in a steam laundry was not conflicting, but was all to the effect that plaintiff, who was twenty-one years of age, knew and realized the defect and danger incident to working with it, she assumed the risk, as a matter of law, and a nonsuit was properly granted.—*Coulter v. Union Laundry Co.*, 590.

Assumption of Risk—Pleadings—Waiver—Nonsuit.

28. Though, in an action for personal injuries, the defense of assumption of risk had not been properly pleaded, but the cause had been tried upon that theory of the defense, and plaintiff's evidence showed that she could not recover in any event, nonsuit was proper.—*Coulter v. Union Laundry Co.*, 590.

MEASURE OF DAMAGES.

See *Damages*.

MILLS AND SMELTERS.

See *Eight-hour Law*.

MINES AND MINING.

See, also, Eight-hour Law; Personal Injuries, 1, 2, 21, 22, 23.

Adverse Claims—Complaint—Sufficiency.

1. In the absence of a special demurrer for ambiguity or uncertainty, a complaint in an action to determine an adverse claim to mining property, alleging that on July 9, 1903, defendant made application for a patent for a conflicting location, and that on the eighth day of September, following, before the sixty days' notice of defendant's application for a patent had expired, plaintiff filed his adverse claim and protest under oath, but failing to state when the first publication of the notice of application for patent was made, was sufficient and not vulnerable to attack by general demurrer.—*Helbert v. Tatem*, 3.

Adverse Suits—Presumptions.

2. The presumption will not be indulged, in an adverse suit, that the first publication of the notice of application for patent to a mining claim (U. S. Rev. Stats., sec. 2325) was made upon the same date on which the application was filed.—*Helbert v. Tatem*, 3.

Adverse Suits—Complaint.

3. The complaint in an adverse suit need not state when the first publication of the notice of application for patent, required by section 2325, United States Revised Statutes, was made, if it otherwise appears that the adverse claim was filed in time.—*Helbert v. Tatem*, 3.

Location—Statutory Requirements—Substantial Compliance.

4. The provisions of sections 3611 and 3612 of the Political Code relative to locations of mining claims, are mandatory, and must be substantially followed in order that the locator may acquire any right under his location.—*Dolan v. Passmore*, 277.

Defective Declaratory Statement.

5. *Held*, in an action for damages for trespass alleged to have been committed by defendants in mining and removing ores from a certain mining claim, that the court committed error in admitting in evidence a copy of plaintiffs' declaratory statement of location which contained, among other things, the following: that locator "dug a tunnel at the point of discovery of the following dimensions: about twelve feet long, six by four and one-half cut three feet deep, six feet wide, wherein is disclosed a well-defined crevice and valuable deposit of ore"; in that the statement was defective for failure to disclose that a vein or lode had been cut by the tunnel at a depth of ten feet below the surface, as required by section 3612 of the Political Code.—*Dolan v. Passmore*, 277.

Declaratory Statement—Record—Proof.

6. The declaratory statement of a mining location required to be filed for record in the office of the county clerk and recorder by section 3612 of the Political Code cannot be supplemented by proof of what was actually done in the premises.—*Dolan v. Passmore*, 277.

Location—Declaratory Statement—Sufficiency.

7. The declaratory statements of two lode locations which read, relative to the description of the excavations made at the points of discovery, respectively, that "a shaft the dimensions of which are _____ feet and _____ feet in ten feet and six inches depth" had been sunk, and in the other, that "a tunnel, the dimensions of which are _____ by _____ feet, and eleven feet eight inches in length," had been run, were defective in that they each contained a statement of but one dimension, whereas the statute (Political Code, section 3612, as amended by Session Laws, 1901, page 140) requires

"the dimensions," including length, breadth and depth, to be stated. *Helena Gold & Iron Co. v. Baggaley*, 464.

Declaratory Statements—Statutory Requirements.

8. The declaratory statement of a lode location should so far comply with the requirements of the statute (Political Code, sections 3611, 3612, as amended by Session Laws, 1901, page 140) as to leave an inference, at least, that the excavation made at the point of discovery cuts the vein at a depth, in case of a shaft, and at a length, in case of a tunnel, of ten feet below the surface.—*Helena Gold & Iron Co. v. Baggaley*, 464.

Adverse Suits—Judgment.

9. *Obiter*: Inasmuch as the federal government is a *quasi* party to adverse suits to mining claims, where it appears that neither party is entitled to patent, judgment should be rendered to that effect.—*Helena Gold & Iron Co. v. Baggaley*, 464.

Location—Interest of Locator.

10. The interest which a locator of a mining claim has in the same, prior to procurement of patent, is only a right to the exclusive possession of the land based upon conditions subsequent, by a failure to fulfill which he forfeits his interest in the claim.—*Helena Gold & Iron Co. v. Baggaley*, 464.

Conflicting Locations—Public Lands.

11. *Held*, that where the locator of a lode mining claim failed to comply with the requirements of the statute relative to completing his location after the posting of his declaratory statement, and another made a location conflicting with the claim of the prior discoverer, the area in conflict did not revert to the public domain, but inured to the benefit of the junior locator who, by performing the necessary work required by statute, became entitled to the possession of it.—*Helena Gold & Iron Co. v. Baggaley*, 464.

MISCONDUCT OF ATTORNEYS.

See Attorneys, 2, 3.

MISCONDUCT OF JURY.

See New Trial, 2.

MONEY PAID.

Liability of Defendant—Instructions.

1. In an action to recover a sum of money alleged to have been paid by plaintiff for the use and benefit of defendant in the purchase of certain stock, a requested instruction that if the jury believed that the plaintiff had purchased the stock for defendant, the latter was bound to pay for it, was erroneous, since, in order to fasten liability upon him, a request, express or implied, on his part, for such purchase must have been shown.—*Donovan-McCormick Co. v. Sparr*, 237.

Issues—Instructions.

2. The complaint, in an action for money paid, alleged that the plaintiff corporation purchased certain shares of stock for the defendant at his special instance and request and that he agreed to pay for them. Defendant interposed a general denial. The court submitted an instruction telling the jury, among other things, that a question for their determination was as to whether the plaintiff company had purchased the stock for itself. The record on appeal did not con-

tain the evidence. *Held*, that the giving of this instruction did not present a new issue, because, under his general denial, the defendant might have presented evidence to show that the plaintiff had purchased the stock for its own use and benefit.—*Donovan-McCormick Co. v. Sparr*, 237.

Instructions—Burden of Proof —Proving Negative.

3. An instruction, given in an action to recover money alleged to have been paid for the use and benefit of defendant in the purchase of certain shares of stock, which told the jury that the burden of proving that it did not buy the stock on its own account was upon the plaintiff corporation, while not to be commended as a mode in which to present a question in controversy to the jury, may not be said, in the absence of the evidence from the record, to impose upon plaintiff any greater burden than that which would have been imposed had the jury been informed that the burden was upon plaintiff to show that the stock was purchased for defendant, since proof of either alternative disproved the other.—*Donovan-McCormick Co. v. Sparr*, 237.

MORTGAGES.

See, also, Claim and Delivery, 4, 5; Conversion, 2, 3, 4; Evidence, 39; Notaries Public, 1, 2, 3, 4.

Separate Instruments—Construction.

1. Where a note, deed and defeasance were all executed at the same time, had reference to the same subject matter, and were a part of the same transaction, the deed being intended as a mortgage to secure the note, the three instruments should be construed as one, as provided by Civil Code, section 2207.—*Bartels v. Davis et al.*, 285.

Defeasance Agreement—Obligation of Mortgagees.

2. Defendants, on May 14, 1903, executed a note to plaintiff, due six months after date. Defendants also executed a deed conveying a number of lots to plaintiff to secure the note, and plaintiff executed a defeasance agreement reciting that, one of the defendants desiring to sell from time to time "during the life of this agreement" certain portions of the property conveyed, plaintiff would convey to any purchaser so obtained, on receipt of fifty dollars per lot, to be applied on the note. *Held*, that the phrase "during the life of this agreement" was intended to designate the period of time during which the defendants, without having breached the contract themselves, might rightfully have demanded performance of its terms by the other party to it, to-wit, six months after May 14, 1903, or to and including November 14th, and that plaintiff was not bound, on November 15th, to either accept a partial payment of the debt due or convey a portion of the mortgaged property.—*Bartels v. Davis et al.*, 285.

Pleadings—Foreclosure—Answer—Denial—Issues.

3. A denial, in an answer to a complaint to foreclose a mortgage, that there was anything due to plaintiff at the time of the commencement of the action, is the denial of a mere conclusion of law, and does not raise any issue.—*Bartels v. Davis et al.*, 285.

Foreclosure—Pleadings—Admission of Material Allegations—General Denial—Effect.

4. Where the answer to a complaint in a foreclosure suit admits all the material allegations of the complaint, a general denial is of no legal effect.—*Bartels v. Davis et al.*, 285.

Foreclosure—Sheriff's Deed to Purchaser—Validity.

5. A purchaser at foreclosure sale went into possession after the expiration of the year within which the mortgagor was entitled to redeem. Nearly four years afterward the then sheriff, as successor of the sheriff making the sale, at the request of the purchaser executed to him a deed. The mortgagor made no offer at any time to redeem. *Held*, that the deed was applied for within a reasonable time, and was valid, within Code of Civil Procedure, section 1237, authorizing the sheriff, as successor in office of the sheriff making a foreclosure sale, to execute a deed to the purchaser.—*McCauley v. Jones*, 375.

Attorney's Lien—Foreclosure—Prior Mortgage—Tender—Complaint.

6. The complaint in a suit to foreclose an attorney's lien on property upon which a prior mortgage was outstanding need not allege that tender of payment of the mortgage lien had been made to the mortgagee, since such tender is not a condition precedent to the bringing of a suit in foreclosure of the attorney's lien.—*Gilchrist v. Hore*, 443.

Conversion—Insolvency—Instructions.

7. The fact that a chattel mortgagor was insolvent at the time she executed a mortgage on property in controversy in an action for damages for conversion did not of itself render the transaction fraudulent and void as against an attaching creditor, since an insolvent person may lawfully pledge his property to obtain loans or to secure an antecedent debt; and an instruction telling the jury, in substance, that, if they found that the mortgage was supported by a valid consideration and given in good faith to secure a debt actually due, the fact that the mortgagor was insolvent at the time she gave the mortgage was not presumptive proof of its fraudulent character, was correct. *Borden v. Lynch*, 503.

MUNICIPAL CORPORATIONS.

See Personal Injuries, 20, 28, 29, 30; Telephones.

MUTUAL BENEFIT ASSOCIATIONS.

See Life Insurance.

MURDER.

See Criminal Law, 8-31, 36-44, 65-68.

NEGLIGENCE.

See Personal Injuries.

NEGOTIABLE INSTRUMENTS.

See Notes.

NEW TRIAL.**Criminal Law—Appeal—Bill of Exceptions.**

1. Under section 2, Chapter 34, p. 48, Session Laws of 1903, the only manner of reviewing an order granting or refusing a new trial in a criminal case is upon a bill of exceptions incorporating the matters upon which it is based.—*State v. Kremer*, 6.

Newly Discovered Evidence—Different Result.

17. The action of the trial court in refusing an application for a new trial on the ground of newly discovered evidence will not be reversed where it is not apparent that if it were granted the result would be different from that reached in the former trial.—*Martin v. Corscadden*, 308.

When Order Granting It will be Affirmed.

18. Where a motion for a new trial was made upon the grounds of newly discovered evidence, insufficiency of the evidence to justify the finding, and that the finding was against law, and the order sustaining it did not designate on which of the grounds it was made, the order will be affirmed if justified on any one of the grounds mentioned in the motion.—*Fournier v. Coudert*, 484.

Conflicting Evidence—District Courts—Discretion—Appeal.

19. In the district court is lodged the sound legal discretion to grant or refuse a new trial in a case where the evidence is conflicting, and its action in the premises will not be reviewed on appeal except for a manifest abuse of such discretion.—*Fournier v. Coudert*, 484.

Finding Against Evidence—District Courts—Discretion—Appeal.

20. If in the opinion of the trial court the evidence in a given case preponderates against the finding of the jury, it should be set aside, and where its action in granting a motion for a new trial can be justified upon that theory, the supreme court on appeal will not say that it abused its discretion in granting the motion.—*Fournier v. Coudert*, 484.

Statement—Sufficiency.

21. Where a statement on motion for a new trial does not contain a recital that all, or the substance of all, the evidence adduced at the trial is incorporated in it, and the narrative of the proceedings is not so connected as to enable the supreme court on appeal to say that it affirmatively appears that such is the fact, the certificate of the judge attached to the statement not referring to the evidence at all, the sufficiency of the evidence to justify the findings of the court in a water right suit will not be reviewed.—*Passavant v. Arnold*, 513.

Statement—Practice—Record—Contents.

22. The better and safer practice for the party moving for a new trial is to insert in the statement a recital showing unequivocally that it contains all, or the substance of all, the evidence adduced at the trial, for in undertaking to construct a narrative of the proceedings so connected as to show affirmatively that such is the fact, he does so at his peril.—*Passavant v. Arnold*, 513.

Appeal—Assignments of Error—Statement—Scope of Review.

23. Assignments of error on the giving and refusing of instructions which were not made in appellants' statement on motion for a new trial will be considered as though the record on appeal contained only the judgment-roll without the evidence.—*Haggerty Bros. v. Lash & Shaughnessy*, 517.

Newly Discovered Evidence—Affidavit—Sufficiency.

24. An affidavit filed by an attorney in support of a motion for a new trial on the ground of newly discovered evidence, stating that he and opposing counsel had stipulated that the deposition of a witness, then out of the state, should be taken; that he relied upon such stipulation; that he asked counsel once where the witness could be found and was informed he did not know but would ascertain; that he never received the desired information; and that neither he nor his client knew

what the absent witness would testify to until after the trial, *held* insufficient to move the discretion of the court, where for a month prior to trial affiant and his client must have known from a complaint filed in intervention, of the character and importance of the testimony of the witness, and where, if misled by opposing counsel, affiant did not make application for a continuance.—*O'Neill v. State Savings Bank et al.*, 521.

Newly Discovered Evidence—Affidavit—Witnesses.

25. Where, from an affidavit filed in support of a motion for a new trial on the ground of newly discovered evidence, it did not appear that movant knew the whereabouts of a witness whose testimony was relied upon and that there was a reasonable probability that it could be secured if a new trial were granted, the district court cannot be said to have abused its discretion in refusing a new trial.—*O'Neill v. State Savings Bank et al.*, 521.

Appeal—Record—Statement—Certification—Sufficiency.

26. Where the judge of a district court recites in his certificate setting a statement on motion for a new trial, that it contains all the evidence in the case, it is sufficient.—*Coulter v. Union Laundry Co.*, 590.

NONSUIT.

See, also, *Personal Injuries*, 1, 3, 33, 34.

Mines—Personal Injuries—Safe Place to Work.

1. *Held*, in a suit for personal injuries, that the district court erred in sustaining a motion for nonsuit made at the close of plaintiff's case, where the evidence introduced tended to show, and for the purposes of the motion did prove, that plaintiff, a miner, had been injured by falling rock and that defendant had failed to keep the "place," already created and completed, in which plaintiff was at work, safe and secure. *Friel v. Kimberly-Mont. Gold M. Co.*, 54.

What Facts Deemed Proved.

2. Upon a motion for a nonsuit those facts will be deemed proved which the evidence tends to prove.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

NOTARIES PUBLIC.

Mortgages—False Certificate—Evidence—Cross-examination.

1. In an action against a notary and the sureties on his official bond, for falsely certifying an acknowledgment to a mortgage on the security of which plaintiff had advanced money, plaintiff was asked on direct examination whether he had any interest in the note and mortgage, both of which ran to another person. Plaintiff answered in the affirmative. On cross-examination he was asked why the mortgage had been made to such other person. An objection was overruled and the witness replied that it was done to avoid his having to pay taxes on the mortgage. *Held*, that the evidence was proper cross-examination, and admissible for the purpose of affecting the credibility of the witness.—*Mahoney v. Dixon et al.*, 454.

Mortgages—False Certificate—Evidence—Cross-examination.

2. On direct examination plaintiff, in an action against a notary and the sureties on his official bond for damages consequent upon a false certification of an acknowledgment to a mortgage, was asked to state what, if any, efforts he had made with a view to recover the amount of money he had advanced on the mortgage. He replied that he had endeavored to secure it from one B., who had introduced

the mortgagor to the notary, and failing in this he had approached the notary with a like demand. On cross-examination he was asked whether R. or his partner had made any offers of settlement. An objection having been overruled, he replied that he could not recollect that any efforts [offers] were made. *Held*, that the question was proper cross-examination, and that in any event no prejudice could have resulted from the answer.—*Mahoney v. Dixon et al.*, 454.

False Certificate—Attorneys—Argument—Reading Law to Jury.

3. Where, in an action against a notary for damages flowing from a false certificate to an acknowledgment of a mortgage, it was contended by defendants that plaintiff's testimony as to the reliance he had placed on the certificate before he loaned his money was in direct conflict with his statements made on a former trial of the cause and counsel for defendants in his argument read to the jury a portion of the opinion of the supreme court rendered in the same case on appeal, to the effect that if plaintiff had not relied on the correctness of the certificate he could not recover,—with the apparent purpose of illustrating to the jury why it had become necessary for plaintiff to change his testimony in this respect,—the court did not abuse the discretion lodged in it in permitting the reading of the excerpt in question.—*Mahoney v. Dixon et al.*, 454.

Appeal—Verdict Against Evidence—Failure of Proof.

4. The verdict for defendants in an action against a notary on his official bond for falsely certifying to an acknowledgment of a mortgage was not open to the objection that it was not justified by the evidence, where the only testimony of the transaction on the part of plaintiff was that of himself and wife, which was contradictory of their respective stories given at a former trial of the cause, a fact which the jury were at liberty to take into consideration on the question of their credibility; and if their testimony on the second trial was disregarded, there was an entire failure of proof, and the verdict for defendants was proper.—*Mahoney v. Dixon et al.*, 454.

NOTES.

See, also, Conversion, 2; Evidence, 39.

Maturity—Rights of Payee.

1. Upon the maturity of a note the payee has an absolute right to demand payment of the debt in full, and he may not legally be compelled to accept a part payment only.—*Bartels v. Davis et al.*, 285.

NOTICE.

See, also, Personal Injuries, 29.

Criminal Law—Bill of Exceptions—Settlement—Statutes.

1. *Held*, that the provisions of section 2171 of the Penal Code, and of section 1 of Chapter 34, page 47, Session Laws of 1903, relating to the settlement of bills of exceptions in criminal cases, and providing that the draft of a proposed bill must be presented, upon at least two days' notice to the adverse party, to the judge for settlement or delivered to the clerk for the judge, are mandatory; that the giving of such notice is an indispensable prerequisite to the consideration of the bill by the supreme court, and that the record must show affirmatively the fact of the giving of such notice.—*State v. Kremer*, 6; *State v. Lee*, 584.

Criminal Law—Bill of Exceptions—Delivery of Copy to Adverse Party.

2. Delivery of a copy of a proposed bill of exceptions to the county attorney, in a criminal case, does not meet the requirements of Penal Code, section 2171, and section 1, Chapter 34, Laws of 1903, page 47, relative to notice of at least two days to the adverse party prior to delivery of such bill to the judge for settlement.—*State v. Kremer*, 6.

Criminal Law—Appeal—Record—Bill of Exceptions—Settlement.

3. Where it does not appear, on appeal in a criminal case, that the statutory notice (Penal Code, sec. 2171; Laws 1903, p. 47) had been given to the county attorney as to the time when the draft of the proposed bill of exceptions would be presented to the district judge for settlement, or that the state had waived such notice, the bill will not be considered by the appellate court.—*State v. Morrison*, 75.

Probate Proceedings—Allowance to Widow.

4. The widow of an intestate being entitled to an allowance during the progress of settlement of the estate of decedent as a matter of right (Code Civ. Proc., secs. 2580, 2582), notice of the court's intention to make such allowance is not required.—*In re Dougherty's Estate*, 336.

OFFER OF PROOF.

See, also, Malicious Prosecution, 7, 8; Criminal Law, 77; Eminent Domain, 1.

Conversion—Evidence—Mortgages—Fraud—Scope.

1. In an action by a chattel mortgagee to recover for the conversion of the property by an officer who had levied thereon, defendant offered to prove by the attaching creditor that the mortgagor had told him shortly before the execution of the mortgage that she intended to execute it to prevent her other creditors from levying on her property. *Held*, that such offer was properly rejected for failure to include a tender of proof that plaintiff was cognizant of the fraudulent intent of the mortgagor in encumbering her property or had aided in its accomplishment.—*Borden v. Lynch*, 503.

ORDERS.

See Appealable Orders.

PARENT AND CHILD.

See Personal Injuries, 19.

PARTIES.

See Contempt, 4, 5, 6.

As witnesses, see Witnesses, 10.

PART PAYMENT.

See Statute of Frauds, 1.

PATENTS.

See Mines and Mining, 1, 2, 3; Public Lands.

PAYMENT.

See Assignment; Checks; Statute of Frauds, 1.

PERSONAL INJURIES.

Mines—Safe Place to Work—Nonsuit.

1. *Held*, in a suit for personal injuries, that the district court erred in sustaining a motion for nonsuit made at the close of plaintiff's case, where the evidence introduced tended to show, and for the purposes of the motion did prove, that plaintiff, a miner, had been injured by falling rock and that defendant had failed to keep the "place," already created and completed, in which plaintiff was at work, safe and secure. *Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Mines—Assumption of Risk—Safe Place to Work.

2. A miner does not assume the risks incident to his employment which flow from his employer's failure to exercise reasonable care to keep the "place," already created and completed, in which the former is at work, safe and secure.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Master and Servant—Nonsuit—Negligence—*Res Ipsa Loquitur*.

3. Where, in an action for personal injuries, the evidence introduced by plaintiff tended to prove that while he was employed as a carpenter in the erection of a building, the master, through its vice-principal, not only had actual charge and control of the piling of certain lumber, through the falling of which plaintiff was injured, but actually directed the manner in which it should be piled and gave directions that particular pains in doing so should not be exercised; that cross-strips or ties should not be employed; that plaintiff was directed by the vice-principal to the very place where he was injured, and where it was self-evident that if properly piled the lumber would not have fallen of its own accord, the doctrine of *res ipsa loquitur* is applicable, so that a *prima facie* case of negligence on the part of defendant was made out, and a motion for nonsuit was therefore properly refused.—*Hardesty v. Largey Lumber Co.*, 151.

Master and Servant—Negligence—Burden of Proof—Presumptions.

4. While the general rule of law is that negligence is not inferable from the mere occurrence of an accident, yet where the thing which causes the injury is shown to be under the management and control of defendant and the accident is of such a nature as to make it apparent that, but for the failure of those in control to use proper care, it would not have happened, proof of the accident raises a presumption of defendant's negligence and casts upon him the burden of showing that ordinary care was exercised.—*Hardesty v. Largey Lumber Co.*, 151.

Master and Servant—Vice-principal—Assumption of Risk—Question for Jury.

5. The question whether the danger from a pile of lumber, by the falling of which plaintiff was injured, was obvious and apparent to him, or equally as apparent to him as to defendant's vice-principal, under whose direction the lumber had been piled and who had directed plaintiff to work at the very place where the accident occurred, by reason of which knowledge plaintiff will be deemed to have assumed the risk incident to his employment, was one for the jury to determine.—*Hardesty v. Largey Lumber Co.*, 151.

Master and Servant—Vice-principal—Fellow-servants.

6. *Held*, under *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582, that one who had actual charge and control of the piling of lumber used in the construction of a building for defendant company, and directed the piling to be done in a certain manner, and later ordered plaintiff, who was injured by the falling of such lumber, to work at the place where the accident occurred, was defendant's vice-principal and not a fellow-servant of plaintiff.—*Hardesty v. Largey Lumber Co.*, 151.

Master and Servant—Safe Place to Work—When Doctrine not Applicable.

7. The doctrine that where a servant is creating a place in which to work the master will not be liable if the former is injured while making such place, is not applicable where plaintiff, a carpenter, was directed to work in a particular place outside of a building in course of construction, and who while executing such order was injured by the falling of improperly piled lumber.—*Hardesty v. Largey Lumber Co.*, 151.

Master and Servant—Statutes—Instructions.

8. *Held*, that sections 2660, 2661, and 2662 of the Civil Code, each of which refers to the "Obligations of the Employer"—the title of the article comprising the sections—are directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment; and that instructions given in such an action embodying these sections were properly submitted.—*Hardesty v. Largey Lumber Co.* (on Rehearing), 151.

Master and Servant—Railroads—Knowledge of Danger—Question for Jury.

9. The plaintiff, employed as a brakeman on a railroad, was injured, while engaged in the performance of his duties, by being struck by a bridge erected over a spur track. He had never been on this spur before. The bridge was about eight feet above the track. The platform of the gondola car on which he was standing was three and one-half or four feet above the track. Plaintiff was a man of five feet and ten inches in height. There were no telltales or other devices for warning employees of the railroad of their approach to the bridge. Plaintiff was struck while endeavoring to release a defective brake. *Held*, that the question whether plaintiff knew or ought to have known of the danger incident to riding under this bridge while standing on the platform of a car was a question for the jury; and that, therefore, a motion for nonsuit was properly overruled.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Master and Servant—Railroads—Contributory Negligence—Instructions.

10. An instruction, in an action for personal injuries brought by a brakeman who was struck by a low bridge while performing his duties as such, which announced the principle that the servant, with knowledge of an existing danger, may be excused from what would otherwise be contributory negligence, if it appeared that an emergency arose by reason of which, while engrossed in the performance of his duties, he forgot the danger or did not appreciate his close proximity to it, was properly given, the testimony showing that plaintiff was injured while endeavoring to release a defective brake after the train had started, and that his attention was absorbed by his duties for the time being.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Master and Servant—Assumption of Risk.

11. *Quære*: Is the doctrine that a servant, knowing of an existing danger, is excusable where he was injured while engrossed in the per-

formance of his duties, by reason of an emergency which absorbs his whole attention, so that for the time being he forgets the danger or his close proximity to it, applicable against the defense of assumed risk? *Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Master and Servant—Railroads—Low Bridges—Duty of Master.

12. An instruction—in an action for personal injuries against a smelting company jointly with a railway company, by a brakeman who, while on cars which were being taken from the smelter over a spur track, was struck by a bridge constructed over the track and maintained by the smelting company—to the effect that if the employees of the railway company were taking out the cars from the smelter at the invitation, express or implied, of the smelting company, it owed to them the duty to keep the premises, as far as the bridge was concerned, in a reasonably safe condition, a violation of which would render it liable, states a correct rule of law.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Master and Servant—Railroads—Low Bridges—Negligence—Question for Jury—Instructions.

13. Whether the construction and maintenance of a bridge by a smelting company, jointly sued with a railway company, over a spur track so low as to cause a brakeman while performing his duties to be injured by coming in contact with it, constituted negligence on the part of the defendant smelting company, was a question for the jury, even though the bridge had a draw which could be removed and so rendered harmless; and a requested instruction charging, as a matter of law, that under such circumstances verdict should be for defendant smelting company, was properly refused.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Master and Servant—Railroads—Duty of Master—Instructions.

14. Where, in an action for personal injuries, instructions relative to the duty of a railway company to its employees were couched in such language that any one of a number of different conclusions might have been drawn by the jury, the supreme court will not say that they selected one substantially correct and rejected those which were erroneous.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Master and Servant—Duty of Master—Railroads.

15. The duty which a railway company owes to its employees with respect to its roadway and appliances is to exercise ordinary care to furnish reasonably safe roadways and appliances, and to use ordinary care and diligence to keep them in a reasonably safe condition.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Instructions—Contributory Negligence—Knowledge of Danger.

16. An instruction, in a suit for personal injuries, that it was incumbent upon defendant to show that plaintiff, a brakeman, injured by coming in contact with a bridge maintained over a railroad track, knew of the existence of the bridge before the defense of contributory negligence could become available, was erroneous in that, if as a reasonably prudent man he ought to have known of the danger incident to the existence of the bridge, he was chargeable with such knowledge. *Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Master and Servant—Railroads—Instructions—Assumption of Risk—Knowledge of Danger.

17. To charge the jury, in a personal injury case, that the plaintiff, a brakeman, injured by coming in contact with a bridge erected over a railway track, must have had actual knowledge of the fact that

the bridge was so low that he could not safely pass under it while standing on the platform of a car, before the defense of assumption of risk could be said to be established was error, since he could not recover if, as a reasonably prudent man, he ought to have known and comprehended the danger.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Pleadings—Complaint.

18. To support a judgment, in an action for personal injuries, in favor of plaintiff, the complaint must state facts sufficient to constitute a cause of action against the defendant *and in favor of the plaintiff*.—*Martin v. City of Butte*, 281.

Complaint—Parent and Child.

19. Under Code of Civil Procedure, section 578, the complaint, in an action brought by the mother of a child to recover damages for personal injuries sustained by the latter, must set forth that the father was dead or had deserted his family at the time the action was commenced, and in the absence of such allegation the complaint fails to state a cause of action in favor of the mother of the child. *Martin v. City of Butte*, 281.

Cities and Towns—Defective Sidewalks—Instructions.

20. An instruction, given in an action to recover damages from a city for personal injuries alleged to have been sustained by reason of a defective sidewalk, telling the jury that it was the duty of the city to see to it that its streets and sidewalks are kept in a safe condition, and, failing in this, it becomes liable to persons injured by reason of such failure, was erroneous, in that it practically made the city an insurer of the safe condition of its streets and sidewalks, whereas it is only compelled to keep its thoroughfares in a reasonably safe and good condition for travel.—*Martin v. City of Butte*, 281.

Mines—Master and Servant—Instructions.

21. An instruction given in an action for damages for personal injuries claimed to have been sustained by plaintiff, a miner, in falling from an unattached ladder leading into a mine,—which charged the jury that if the injury arose out of the “obvious and ordinary” risks and dangers assumed by plaintiff in entering defendant’s employ, recovery could not be had,—was proper, even though defendant’s answer did not aver that the risks were ordinary ones, but where evidence had been introduced in its behalf, without objection, to support such theory and where the whole case had been tried on this theory of the defense.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Mines—Master and Servant—Instructions.

22. An instruction submitted to the jury in a personal injury case that plaintiff, a miner, injured while descending into a mine on an unattached ladder, was bound to ascertain whether the ladder was loose or not, and that “his duty would not permit him to blindly venture upon it without investigation,” is not open to the objection that it virtually made it the duty of the employee to act as an inspector, or investigator of appliances in the mine, since it simply announced that it was his duty to use ordinary care—common sense—to see or feel where and how the ladder was before venturing upon it.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Mines—Master and Servant—Ordinary Care—Question for Jury.

23. The question whether a miner, injured while descending into a mine on an unattached ladder, used ordinary care in failing to satisfy himself where and how the ladder was, was one for the jury to determine.—*Thomas v. Boston & Mont. Con. C. & S. M. Co.*, 370.

Master and Servant—Defective Appliances—Evidence—Review.

24. Evidence submitted in an action for personal injuries, alleged to have been sustained by plaintiff, a laborer, by reason of his employer's negligence in directing him to work in an unsafe place and with defective appliances, reviewed and held sufficient to go to the jury.—*Johnson v. Malette*, 477.

Contributory Negligence—Servant Choosing Mode of Doing Work.

25. Where a laborer was directed by his employer to make certain alterations on an elevator without indicating the mode in which the work should be done, and the employee voluntarily selected one which was more dangerous than another method in which it might have been done, it must have appeared, in order to attribute contributory negligence to the employee as a matter of law, that the mode employed by him was known to him to be more dangerous, or its dangerous character must have been so obvious that he could be presumed to have known it.—*Johnson v. Malette*, 477.

Negligence of Employer in Giving General Directions.

26. An order by an employer to his employee to do certain work without pointing out the mode of doing it was equivalent to directing him to use such mode as to him (the employee) seemed most suitable; and where, in performing the work, the servant was injured, it was a question for the jury to say upon the evidence,—which tended to prove the allegations of the complaint that the injury was caused by reason of a defective appliance furnished by defendant employer, and that the latter gave such direction,—whether the defendant was guilty of negligence in supplying such faulty appliance and in giving the general direction to the employee he did give.—*Johnson v. Malette*, 477.

Master and Servant—Instructions—"Obviously" Dangerous Mode of Doing Work.

27. An instruction given in an action against a building contractor for personal injuries to one of his employees, who had been directed to do certain work without being told in what mode to do it, and in doing it was injured, to the effect that where two ways are open to an employee of performing a duty, one of which is *obviously* dangerous and the other safe, and he knowingly and voluntarily or through negligent ignorance selects the dangerous one, thereby bringing upon himself an injury which probably would not have befallen him had he selected the other one, he cannot recover, but contributory negligence will be imputed to him as a matter of law, was not made erroneous by the use of the word "obviously" before the word "dangerous."—*Johnson v. Malette*, 477.

Cities and Towns—Defective Sidewalks—Instructions.

28. An instruction, given in an action to recover damages for personal injuries claimed to have been sustained by plaintiff by reason of a fall into an excavation next to a sidewalk, negligently left unguarded by the defendant city, that the jury could, in fixing the damages, take into consideration "any pain or suffering which he (plaintiff) has endured, as a result of any injury which he has sustained, up to the *present time*," etc., was not open to the objection that it directed the jury to compensate plaintiff for any injury sustained prior to the time of the trial, whether through the negligence of defendant or not, where the evidence was all directed to the injury alleged in the complaint and to no other and the jury, therefore, must have understood that the clause "up to the present time" had reference to the pain and suffering endured and not to the injury.—*Kelly v. City of Butte*, 530.

Appeal—Evidence—Record—New Trial Statement—Review.

29. In the absence of certain ordinances from the statement on motion for a new trial, introduced on the trial of an action against a city for personal injuries alleged to have been sustained by reason of a defective sidewalk, ostensibly showing that it was incumbent on the street commissioner and the chief of police to look after the streets, the sufficiency of the evidence to go to the jury as to defendant's notice of the defect in the sidewalk will not be reviewed, since the duties of such officers may have been such as to make daily inspections of streets and sidewalks, in which event notice may be presumed.—*Kelly v. City of Butte*, 530.

Cities and Towns—Damages—Evidence—Excessive Verdict.

30. Where plaintiff, in an action against a city for damages on account of personal injuries sustained by reason of defendant's negligence in permitting an excavation adjoining a sidewalk to remain unguarded, fell a distance of seven or eight feet, was severely cut about the head, had one tooth knocked out and another broken, was bruised in the hips and suffered other like injuries, a verdict for \$1,000 may not be said to be unwarranted by the evidence; and where defendant city did not itself complain that it was excessive, the supreme court on appeal will not say that it is.—*Kelly v. City of Butte*, 530.

Master and Servant—Patently Defective Machinery—Complaint—Sufficiency.

31. A complaint, in an action by an employee of a steam laundry for injuries claimed to have been sustained by plaintiff while working on a defective mangle, is not insufficient for failure to allege that the defect in the machine was known to defendant, where sufficient facts were set up to show that the defect was patent and not latent.—*Coulter v. Union Laundry Co.*, 590.

Statutory Liability of Master—Injuries to Servant—Defenses.

32. In an action for personal injuries alleged to have been sustained by plaintiff, a laundry employee, while working on a patently defective mangle, the evidence showed that she was twenty-one years of age, had worked for fourteen months in laundries, was familiar with the construction and operation of the machine, knew the defect in it and had not notified defendant of its defective condition, but continued in the employment until she was injured. Section 2662, Civil Code, makes an employer liable to his employee for losses caused by the former's want of ordinary care. *Held*, that this section, under such circumstances, did not preclude defendant from offering any defense, though he did not use ordinary care in furnishing ordinarily safe machinery.—*Coulter v. Union Laundry Co.*, 590.

Injuries to Servant—Assumption of Risk—Nonsuit.

33. Where the evidence in an action for personal injuries sustained by an operator of a patently defective mangle in a steam laundry was not conflicting, but was all to the effect that plaintiff, who was twenty-one years of age, knew and realized the defect and danger incident to working with it, she assumed the risk, as a matter of law, and a nonsuit was properly granted.—*Coulter v. Union Laundry Co.*, 590.

Assumption of Risk—Pleadings—Waiver—Nonsuit.

34. Though, in an action for personal injuries, the defense of assumption of risk had not been properly pleaded, but the cause had been tried upon that theory of the defense, and plaintiff's evidence showed that she could not recover in any event, nonsuit was proper.—*Coulter v. Union Laundry Co.*, 590.

PLEADING AND PRACTICE.

Mines—Adverse Claims—Complaint—Sufficiency.

1. In the absence of a special demurrer for ambiguity or uncertainty, a complaint in an action to determine an adverse claim to mining property, alleging that on July 9, 1903, defendant made application for a patent, for a conflicting location, and that on the eighth day of September, following, before the sixty days' notice of defendant's application for a patent had expired, plaintiff filed his adverse claim and protest under oath, but failing to state when the first publication of the notice of application for patent was made, was sufficient and not vulnerable to attack by general demurrer.—*Helbert v. Tatem*, 3.

Mines—Adverse Suits—Complaint.

2. The complaint in an adverse suit need not state when the first publication of the notice of application for patent, required by section 2325, United States Revised Statutes, was made, if it otherwise appears that the adverse claim was filed in time.—*Helbert v. Tatem*, 3.

Criminal Law—Objections to Evidence—Form.

3. An objection to questions asked defendant, charged with murder, on cross-examination that the evidence sought was "incompetent, irrelevant, immaterial and not cross-examination" was too general, where it was apparent that the evidence sought was material.—*State v. Lu Sing*, 31.

New Trial—Statement—Sufficiency.

4. The fact that a statement on motion for a new trial, in a suit for personal injuries, was denominated, by the moving party, "a statement of the case and bill of exceptions," did not render it objectionable; it being immaterial what a paper is called.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Default—Motion to Vacate—Grounds.

5. To justify the granting of a motion to vacate a default, defendant must show that he proceeded with diligence; that the default occurred through his excusable neglect; that the judgment, if permitted to stand, will affect him injuriously; and that he has a defense to plaintiff's cause of action on the merits.—*Bowen v. Webb*, 61.

Vacation—Affidavit of Merits—Practice—Demurrer.

6. A default will not be vacated merely to permit the defendant to file a demurrer to the complaint, but the application must be accompanied by an affidavit showing a defense to the plaintiff's cause of action upon the merits.—*Bowen v. Webb*, 61.

Default—Affidavit of Merits—Answer.

7. *Quære*: May an answer, when properly identified, sufficient in form and offered for that purpose, perform the office of an affidavit of merits requisite to an application to open a default?—*Bowen v. Webb*, 61.

Personal Injuries—Complaint.

8. To support a judgment, in an action for personal injuries, in favor of plaintiff, the complaint must state facts sufficient to constitute a cause of action against the defendant *and in favor of the plaintiff*.—*Martin v. City of Butte*, 281.

Personal Injuries—Complaint—Parent and Child.

9. Under Code of Civil Procedure, section 578, the complaint, in an action brought by the mother of a child to recover damages for personal injuries sustained by the latter, must set forth that the father was dead or had deserted his family at the time the action

was commenced, and in the absence of such allegation the complaint fails to state a cause of action in favor of the mother of the child. *Martin v. City of Butte*, 281.

Mortgages—Foreclosure—Answer—Denial—Issues.

10. A denial, in an answer to a complaint to foreclose a mortgage, that there was anything due to plaintiff at the time of the commencement of the action, is the denial of a mere conclusion of law, and does not raise any issue.—*Bartels v. Davis et al.*, 285.

Foreclosure—Admission of Material Allegations—General Denial—Effect.

11. Where the answer to a complaint in a foreclosure suit admits all the material allegations of the complaint, a general denial is of no legal effect.—*Bartels v. Davis et al.*, 285.

Causes of Action—Counts.

12. Under Code of Civil Procedure, section 672, the trial court may, in its discretion, permit the same cause of action to be stated in different counts in order to meet the exigencies of the case as presented by the evidence.—*Blankenship et al. v. Decker et al.*, 292.

Brokers—Contracts—Proof.

13. Though a contract authorizing a broker to sell real estate must be in writing and subscribed by the party to be charged or his agent (Civil Code, sec. 2185, subsec. 6), the fact that it is in writing is a matter of proof and not of allegation in pleading.—*Blankenship et al. v. Decker et al.*, 292.

Malicious Prosecution—Exemplary Damages—Complaint—Instructions.

14. *Held*, under section 4290, Civil Code, that in order for plaintiff to recover punitive damages, in an action for malicious prosecution, in addition to those actually sustained, it is not necessary that he claim them, *eo nomine*, in his complaint.—*Martin v. Corscadden*, 308.

***Mandamus*—County Commissioners—Constitutional Amendments—Regularity of Adoption.**

15. After the amendment to the Constitution relative to the election and tenure of county commissioners (Session Laws, 1901, p. 208) had been declared regularly adopted by proclamation of the governor, it thus becoming *prima facie* a law of which courts took judicial notice, it was incumbent upon relator in a proceeding in *mandamus*, in which the regularity of the adoption of the amendment was attacked, to plead facts showing a noncompliance with the provisions of the Constitution which prescribe the mode to be pursued in amending that instrument; and for failure to so plead, and in the absence of an offer to amend, the court properly sustained a motion to quash.—*State ex rel. Teague v. County Commissioners et al.*, 426.

Attorney's Lien—Foreclosure—Prior Mortgage—Tender—Complaint.

16. The complaint in a suit to foreclose an attorney's lien on property upon which a prior mortgage was outstanding need not allege that tender of payment of the mortgage lien had been made to the mortgagee, since such tender is not a condition precedent to the bringing of a suit in foreclosure of the attorney's lien.—*Gilchrist v. Hore et al.*, 443.

Attorney's Lien—Foreclosure—Evidence—Exclusion.

17. In an action by an attorney to foreclose an attorney's lien which he had acquired on certain lands, one of the defendants answered, affirmatively setting forth that she had a prior mortgage on the premises and asking that it be foreclosed. Plaintiff filed a reply alleging that defendant had had the use of the property and had received rents and profits from it to the amount of \$1,000. On the

trial the answering defendant offered proof that she had only received \$450 in rents. Plaintiff objected on the ground that defendant's pleading was a cross-complaint, and that his reply was an answer which required a reply, and that by her failure to file such reply the receipt by her of \$1,000 in rents had been admitted. *Held*, that the only pleading of facts permitted under the Code on the part of defendant being an answer, on the part of plaintiff thereafter a reply, any new matter in which is deemed denied, the court erred in excluding the offered testimony.—*Gilchrist v. Hore et al.*, 443.

Counterclaim—Statutes.

18. *Held*, that section 981 of the Code of Civil Procedure, providing that where a defendant interposes a counterclaim and demands affirmative relief against the plaintiff, his right to the relief is the same as in an action against the plaintiff directly, and that the defendant shall be deemed plaintiff and the plaintiff the defendant, is applicable only to Title VII, which has to do with provisional remedies in civil actions and not with questions of pleading, controlled by Title VI of that Code.—*Gilchrist v. Hore et al.*, 443.

Contracts—Breach—Real Property—Conveyance—Measure of Damages—Complaint.

19. The measure of damages recoverable in an action for the breach of a contract to convey real property is, under section 4306 of the Civil Code, in the absence of bad faith on the part of the vendor, the price paid for the property, together with the expenses properly incurred in examining the title and preparing the necessary papers, with interest. Plaintiff in such an action sued to recover the amount paid by him to secure title, after discovering that defendant was unable to convey it. *Held*, that bad faith not having been alleged, recovery could only be had for the amount paid to defendant on the purchase price, together with incidental expenses, and that the court properly sustained defendant's objection to the introduction of any evidence by plaintiff for the reason that the complaint failed to state a cause of action.—*Willard v. Smith*, 494.

Condemnation Proceedings—Appearance of Defendant—Failure—Effect.

20. *Held*, that defendant in condemnation proceedings is required to appear, either by demurrer or answer; and if he fails so to do, he has no standing in court for any purpose and may not be heard in the subsequent proceedings, notwithstanding the provisions of section 2221 of the Code of Civil Procedure, that the commissioners appointed to assess the damages shall hear the allegations and evidence of all persons interested, this section having reference to cases where the parties defendant are not in default.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Condemnation Proceedings—Failure of Defendant to Plead—Effect—Duty of Court.

21. Failure of defendant in condemnation proceedings to appear, either by demurrer or answer, does not relieve the court of the duty of determining whether the use for which the property is sought to be condemned is a public use, limiting the amount taken to the necessities of the case and ascertaining the damages as provided in sections 2220, 2221 and 2224 of the Code of Civil Procedure.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Same—Failure of Plaintiff to Take Default—Effect—Presumptions.

22. Where plaintiff railroad company, in a condemnation proceeding, failed to take default against defendants, who had not answered or demurred, but permitted the case to proceed as if pleadings had been

filed and issues properly made, and found no fault with any of the proceedings until hearing on appeal, it will be presumed that issues were made and properly determined.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Same—Damages—Pleadings—Counterclaims—Statutes.

23. Title VII, Part III of the Code of Civil Procedure, does not require, either expressly or by implication, the defendant in condemnation proceedings to set up his claims for damages, special or general, and section 691 of that Code will not permit their being pleaded by way of counterclaim; and, therefore, plaintiff railroad company cannot be heard to complain that, by defendant's failure to plead them, it had no notice of their character and amount and was deprived of an opportunity to controvert them.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Same—Damages to Lands not Taken—Evidence.

24. In the absence of statutory provision making it incumbent upon defendants in condemnation proceedings, instituted by a railroad company for right of way purposes, to specially plead damages to portions of their lands not actually traversed by the road and not described in the petition, they were not required so to do, and evidence showing such damages was properly admissible.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Same—Lands not Taken—Damages not Special—Pleadings.

25. Damages accruing to portions of the land of defendant in condemnation proceedings, instituted by a railroad company to secure a right of way, not actually traversed by the road, are not special in the sense that they should be pleaded.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Same—Pleadings of Plaintiff—Estoppel.

26. A railroad company seeking to acquire a right of way, but failing in its petition to mention the land not taken or damages thereto, cannot be heard to say that the detriment to the part not described is special and must be pleaded before it can be shown in evidence.—*Yellowstone Park R. R. Co. v. Bridger Coal Co. et al.*, 545.

Master and Servant—Personal Injuries—Patently Defective Machinery—Complaint—Sufficiency.

27. A complaint, in an action by an employee of a steam laundry for injuries claimed to have been sustained by plaintiff while working on a defective mangle, is not insufficient for failure to allege that the defect in the machine was known to defendant, where sufficient facts were set up to show that the defect was patent and not latent.—*Coulter v. Union Laundry Co.*, 590.

Master and Servant—Personal Injuries—Assumption of Risk—Pleadings—Waiver—Nonsuit.

28. Though, in an action for personal injuries, the defense of assumption of risk had not been properly pleaded, but the cause had been tried upon that theory of the defense, and plaintiff's evidence showed that she could not recover in any event, nonsuit was proper.—*Coulter v. Union Laundry Co.*, 590.

POWER OF ATTORNEY.

See Claim and Delivery, 6.

PRESUMPTIONS.

See, also, Pleading and Practice, 22.

Mines—Adverse Suits.

1. The presumption will not be indulged, in an adverse suit, that the first publication of the notice of application for patent to a mining claim (U. S. Rev. Stats., sec. 2325) was made upon the same date on which the application was filed.—*Helbert v. Tatem*, 3.

Appeal—Error—Record.

2. Error will not be presumed by an appellate court; it must be made to appear affirmatively in the record to entitle it to consideration.—*State v. Kremer*, 6.

Criminal Law—Instructions—Commenting on Evidence.

3. An instruction requested by defendant, accused of homicide, that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, "affords a strong presumption of innocence," was properly refused, it being misleading and an invasion of the province of the jury.—*State v. Lu Sing*, 31.

Criminal Law—Time for Pronouncing Sentence—Presumptions.

4. When two days did not intervene between the rendition of a verdict of guilty in a capital case, and the pronouncement of judgment (Penal Code, sec. 2210), it will be presumed on appeal, in the absence of anything in the record to the contrary, that the court did not remain in session after the date on which the judgment was pronounced.—*State v. Lu Sing*, 31.

New Trial—Statement—Settlement.

5. Where the record is silent as to what steps were taken to procure the settlement of a statement on motion for a new trial, the presumption will be indulged that it was settled according to law.—*Friel v. Kimberly-Mont. Gold M. Co.*, 54.

Default—Affidavit of Merits—Answer.

6. Where, on appeal from an order denying a motion to open a default so as to permit defendant to file a demurrer to the complaint, the bill of exceptions recited that the motion had been heard upon the complaint, motion and affidavits, it will not be presumed that a proffered answer, which was neither identified nor referred to as a paper offered in support of the motion, was considered by the court as an affidavit of merits.—*Bowen v. Webb*, 61.

Appeal—District Courts—Rulings.

7. Every presumption in favor of rulings of the district court will be indulged in the appellate court.—*Bowen v. Webb*, 61.

Appeal—Error.

8. Error will not be presumed; it must be made to appear affirmatively.—*Bowen v. Webb*, 61.

Water Rights—Increase by Artificial Means.

9. Where, in a water right suit it did not appear that certain spring or seepage water having its rise in the bed of a creek, was so made to rise by artificial means, and in the absence of a finding to that effect, the presumption will obtain that such water forms a part of

the natural supply of the creek.—*Beaverhead Canal Co. v. Dillon El. L. & P. Co. et al.*, 135.

Master and Servant—Personal Injuries—Negligence—Burden of Proof.

10. While the general rule of law is that negligence is not inferable from the mere occurrence of an accident, yet where the thing which causes the injury is shown to be under the management and control of defendant and the accident is of such a nature as to make it apparent that, but for the failure of those in control to use proper care, it would not have happened, proof of the accident raises a presumption of defendant's negligence and casts upon him the burden of showing that ordinary care was exercised.—*Hardesty v. Largey Lumber Co.*, 151.

Appeal—Record—Absence of Evidence—Pleadings.

11. Every reasonable presumption will be indulged in favor of the action of the trial court; and in the absence of the evidence from the record on appeal, it will be presumed that instructions were warranted by the interpretation of the pleadings acted upon by the parties, and by the evidence in the case, unless the contrary appears.—*Donovan-McCormick Co. v. Sparr*, 237.

Instructions—Error—Prejudice.

12. In the absence of anything to show that prejudice could not reasonably have followed the giving of an erroneous instruction, and the error appearing, prejudice will be presumed.—*Martin v. City of Butte*, 287.

Brokers—Contracts—Uncertainty—Instructions.

13. While, under section 2219, Civil Code, in the absence of proof the presumption will be indulged that the promisor caused any ambiguity or uncertainty in the terms of a written contract, yet where the evidence introduced permits the inference that the promisee wrote the agreement and himself selected the terms employed therein, this presumption gives way to the contrary one that the latter caused the uncertainty, and the burden rests upon him to remove it, and the district court, in an action to recover for services alleged to have been rendered as brokers to sell real estate, should have given appellants' (promisors') requested instruction embodying this principle, where the evidence tended to prove that one of them went to plaintiffs' office and procured a member of the brokerage firm to write a memorandum agreement, composing it himself, but following the client's wishes.—*Blankenship et al. v. Decker et al.*, 292.

Appeal Bonds—Sufficiency—Failure to Except.

14. From a failure to except to the sufficiency of sureties on an appeal bond, the presumption arises that it was sufficient.—*O'Neill v. State Savings Bank et al.*, 521.

PRINCIPAL.

See Criminal Law, 60, 61, 62.

PRINCIPAL AND AGENT.

See, also, Claim and Delivery, 6; Life Insurance, 5.

Contracts of Sale—Part Payment—Effect—Statute of Frauds.

1. Defendant in an action for the breach of a written contract had orally instructed his agent to sell a large number of cattle for him and to require payment of part of the purchase price. A purchaser was found, a check for \$5,000 as part payment accepted by the agent

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and placed to the credit of defendant in bank, and a written agreement entered into between the purchaser and the agent acting for defendant. Defendant thereafter refused to deliver the cattle, claiming that the agent had exceeded his authority, and that the contract was void in that the authority of the agent to make the sale was not in writing. *Held*, that payment of part of the purchase price brought the transaction within the exception provided for in section 3276 of the Code of Civil Procedure and sections 2185 and 2340 of the Civil Code, relative to contracts which must be in writing, and that therefore the provisions of section 3085 of the Civil Code, declaring that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing, has no application and that the contract was valid.—*Case et al. v. Kramer*, 142.

Sales—Payment—Checks.

2. While an agent authorized to receive payment of money should accept cash only, yet where one employed to sell cattle, accepted as part payment a check payable to the order of the principal, indorsed it for collection and subsequently cashed it and placed the money in bank to the credit of his principal, the latter cannot complain, and it is immaterial that the check, made payable to the principal, had been indorsed in his name for collection by the agent without special authority to that effect, inasmuch as the principal actually received the money.—*Case et al. v. Kramer*, 142.

PRINCIPAL AND SURETY.

See Appeal, 70, 72.

PRIVIES.

See Contempt, 5.

PROBABLE CAUSE.

See Malicious Prosecution, 3, 4, 5, 6, 11, 12.

PROBATE PROCEEDINGS.

Foreign Wills—Contests—Prohibition.

1. A will executed in another state in accordance with its laws, by a testator residing there and having both real and personal property in this state at the time of his death, and subsequently duly admitted to probate there and afterward to ancillary probate in the county in this state in which the property of the testator was situated, may not be contested in the courts in this state upon the grounds that the testator at the time of making it was not of sound and disposing mind, or was acting under duress, fraud or undue influence; and prohibition lies to restrain the district court from proceeding to hear such contest.—*State ex rel. Ruef v. District Court et al.*, 96.

Foreign Wills—Statutes.

2. While the Code of Civil Procedure does not in express terms provide for the probate of a will executed in another state, it does so impliedly by section 2351, which makes provision for a hearing of such application and notice thereof.—*State ex rel. Ruef v. District Court et al.*, 96.

Foreign Wills—Contest—Grounds.

3. The grounds upon which the probate of a foreign will may be contested, while not expressly designated in the Code of Civil Procedure, are impliedly set forth in section 2352 by the questions with

reference to which the trial court must make findings before admitting it to probate.—State ex rel. Ruef v. District Court et al., 96.

Judgment.

4. A judgment in probate proceedings is a judgment *in rem*.—State ex rel. Ruef v. District Court et al., 96.

Wills—Decree Admitting to Probate—Effect.

5. A decree of a court admitting a will to probate establishes such instrument as a will, and while the decree may be subject to attack in a proper proceeding and open to review on appeal, yet, until set aside, such decree is conclusive of all facts necessary to the validity of the will.—State ex rel. Ruef v. District Court et al., 96.

Foreign Wills—Probate—Requisites.

6. In order to allow a will executed in another state to probate in this state, it must first appear that it was duly proved, allowed and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made, or in which the testator was at the time domiciled or in conformity to the laws of this state, and that the record is authenticated as required by section 905 of the United States Revised Statutes.—State ex rel. Ruef v. District Court et al., 96.

Wills—Special Administrators—Guardians *Ad Litem*—Appointment—Statutes—Districts Courts—Jurisdiction—*Certiorari*.

7. Section 2500 of the Code of Civil Procedure provides for the appointment of a special administrator where there is delay in granting letters testamentary by reason of any legal cause. The district court in a probate proceeding appointed a guardian *ad litem* for two minor heirs, who thereupon filed objections to the probate of the will and prayed for the appointment of a special administrator pending the hearing of the petition for letters and objections thereto. The public administrator was appointed as such special administrator. *Held*, on *certiorari*, to annul the order, that section 574 of the same Code, providing for the appointment of a guardian *ad litem*, has reference to civil actions, as distinguished from probate proceedings, which latter fall under the designation of "Special Proceedings of a Civil Nature"; that section 2925 of that Code relative to the appointment of a competent attorney to *represent* minor heirs who have no general guardian, at hearings of petitions and contests for the probate of wills, etc., is exclusive and applicable only to probate proceedings; that for this reason the minors could not appear by guardian *ad litem* in opposition to the probate of the will; that, therefore, his objections did not furnish any legal cause for delay which made the appointment of a special administrator necessary, and, hence, that the district court was without jurisdiction to make the order complained of.—State ex rel. Eakins v. District Court et al., 226.

Special Administrators—Preference to Appointment—Public Administrators.

8. Where there exists a legal cause for the appointment of a special administrator, the district court must, under section 2502 of the Code of Civil Procedure, appoint some one entitled to such appointment; and the selection of a public administrator to act as such officer, in preference to the widow of decedent who had been named as legatee and devisee in the will and as executrix thereof, was a violation of the provisions of the statute.—State ex rel. Eakins v. District Court et al., 226.

Special Administrators—Appointment—Objection—Waiver—District Courts—Jurisdiction.

9. The mere fact that the widow of testator asked that she be appointed special administratrix of the estate of decedent, when a legal cause for the appointment of such officer did not exist, did not estop her to object to the appointment of another, or confer jurisdiction upon the court to appoint another.—*State ex rel. Eakins v. District Court*, 226.

Certiorari—Executors—Objections to Final Accounts.

10. *Certiorari* does not lie to review the action of the district court, while sitting in probate, in granting a motion to strike out objections to the final account of an executrix and to a petition for distribution of the estate.—*State ex rel. Cotter et al. v. District Court et al.*, 303.

Appealable Orders.

11. Under section 1722 of the Code of Civil Procedure, as amended by Act of 1899 (Laws 1899, p. 146), an order granting a motion to strike out objections to the final account of an executrix and to a petition for distribution of the estate is not appealable.—*State ex rel. Cotter et al. v. District Court et al.*, 303.

Erroneous Orders—Appeal.

12. *Obiter*: An erroneous order of the district court, while sitting in probate matters, settling the account of an executrix and directing distribution of the estate, may be reviewed on appeal, and on such appeal an error alleged to have been committed in striking out objections to the granting of the order might be considered.—*State ex rel. Cotter et al. v. District Court et al.*, 303.

District Courts—Appointment of Attorneys for Minors.

13. The district court, in its discretion, may, in probate proceedings, under section 2925 of the Code of Civil Procedure, appoint an attorney for minor heirs.—*State ex rel. Cotter et al. v. District Court et al.*, 306.

Certiorari—Order Appointing Attorney for Minors—Vacation.

14. *Certiorari* is not the proper remedy to review an order of the district court made in probate proceedings, vacating an order, theretofore made, appointing an attorney for minor heirs.—*State ex rel. Cotter et al. v. District Court et al.*, 306.

Administrators—Accounts—Allowance to Widow—Modification—Appeal.

15. An administratrix whose account was so modified by an order of the district court as to strike out a portion of her allowance as widow of her intestate could not appeal from such order in her representative capacity, since as administratrix she was not aggrieved, the order only affecting her in her individual right.—*In re Dougherty's Estate*, 336.

Appeals—Record.

16. In the absence of specific provisions, in the Code of Civil Procedure, relating to new trials and appeals in probate proceedings as to the contents of the record in such cases, or the mode of authenticating it, the provisions regulating bills of exceptions, statements and appeals in ordinary actions are applicable, and, so far as may be, the analogies between them must govern.—*In re Dougherty's Estate*, 336.

Appeals—Judgment-roll—Record.

17. While, technically, there is no judgment-roll in probate proceedings, the successive determinations of the court in the course of them, whenever directly or by implication declared by the statute to be

final, must be regarded as final judgments, and the portions of the record upon which they are based must, on appeal, be regarded as the record for the particular determination.—In re Dougherty's Estate, 336.

Administrators—Accounts—Settlement—Appeal—Record.

18. On appeal from an order of the district court settling the account of an administratrix, the account, the written objections thereto, and the findings, and order of the court, together with a certified copy of the notice of appeal, held to be the judgment-roll for the purpose of the appeal, and a sufficient record to entitle the appeal to consideration on its merits.—In re Dougherty's Estate, 336.

Appeal—Record.

19. *Obiter*: Matters not forming part of the judgment-roll in a probate proceeding should be incorporated in a bill of exceptions or statement on motion for new trial, as the case may be, for purpose of appeal.—In re Dougherty's Estate, 336.

Allowance to Widow—Notice.

20. The widow of an intestate being entitled to an allowance during the progress of settlement of the estate of decedent as a matter of right (Code Civ. Proc., secs. 2580, 2582), notice of the court's intention to make such allowance is not required.—In re Dougherty's Estate, 336.

Allowance to Widow—Application—Necessity.

21. *Semble*: A widow being entitled to an allowance as a matter of right, pending the settlement of the estate of her deceased husband, it would seem that a formal application therefor is not required.—In re Dougherty's Estate, 336.

Allowance to Widow—Appealable Orders.

22. An order granting an allowance to a widow out of the estate of her intestate is appealable, under Code of Civil Procedure, section 1722, as amended by Act of 1899 (Laws 1899, p. 146), and where an appeal therefrom is not taken within sixty days, it becomes final and conclusive and may not thereafter be attacked collaterally.—In re Dougherty's Estate, 336.

Allowance to Widow—Modification—Mode.

23. *Obiter*: If an order making an allowance to a widow may be modified from time to time, in order to meet the changed conditions of the estate or the varying necessities of the widow, or the widow and children, a direct motion to that effect must be made, and mere objections to the account of the administratrix are not sufficient to move the discretion of the court in the matter.—In re Dougherty's Estate, 336.

Allowance to Widow—For What Period.

24. Under Code of Civil Procedure, section 2582, declaring that, if an estate is not insolvent, the allowance made to the widow may continue "during the progress of the settlement of the estate," the widow can claim such an allowance only for such length of time as is reasonably necessary to settle the estate.—In re Dougherty's Estate, 336.

Allowance to Widow—For What Period.

25. An estate, the appraised value of which did not exceed \$5,000, was ready for distribution February 6, 1904, at which time all claims against the estate had been paid, including an allowance to the widow amounting to \$2,085.51. The allowance claimed by the widow up to that date amounted to \$3,124.90 and on March 21, 1905, to \$4,829.80.

Held, that the court was justified in refusing to ratify any allowance after the estate was ready for distribution.—*In re Dougherty's Estate*, 336.

Allowance to Widow—Objections—Estoppel.

26. The indulgence of persons, interested in the estate of an intestate, in not compelling an administratrix to make final settlement and distribution after the expiration of a reasonable length of time in which to wind up the affairs of the estate, did not estop them to object to an allowance, claimed by her in her individual capacity as widow of her intestate, after the date when settlement should have been made.—*In re Dougherty's Estate*, 336.

***Certiorari*—Order of Sale—Real Property—Staying Execution.**

27. The district court, sitting in probate, made an order of sale of certain real property to satisfy claims of creditors of the estate. Subsequently one of the devisees filed a petition that the property specifically devised to him be distributed to him. The court thereupon made an order requiring all persons interested in the estate to appear and show cause why the order prayed for should not be made, upon the execution by petitioner of an undertaking conditioned to pay his proportion of the debts of the estate, and directed the executor to postpone the sale until after hearing of the petition. *Held*, on *certiorari*, that the court had jurisdiction of the matter, and in determining it, to inquire into the condition of the estate and see whether a necessity for the sale still existed, and make its order accordingly, and that therefore the writ will not lie.—*State ex rel. Pauwelyn v. District Court et al.*, 345.

Order of Sale—Real Estate—Stay of Execution—Prohibition.

28. Prohibition does not lie to restrain the district court, while sitting in probate matters, from hearing the petition of one of the devisees under a will, for distribution to him of that portion of the estate specifically devised to him, even though it had theretofore made an order to sell the real property to pay the debts of the estate, the court having had jurisdiction to hear and determine the matter. (See, also, syllabus in *State ex rel. Pauwelyn v. District Court et al.*, ante, p. 345, 86 Pac. 269.)—*State ex rel. Pauwelyn v. District Court et al.*, 349.

PROCESS.

District Courts—Control of.

1. The district court has power to control its own process within just limits, and so to protect the rights of parties and prevent arbitrary and unwarranted action by its officers.—*State ex rel. Pauwelyn v. District Court et al.*, 345.

PROHIBITION.

See *Justices of the Peace*, 2; *Probate Proceedings*, 1, 28; *Wills*, 1.

PROMISSORY NOTES.

See *Notes*.

PROVING NEGATIVE.

See *Burden of Proof*, 2.

PUBLIC ADMINISTRATORS.

See, also, Probate Proceedings, 7.

Probate of Wills—Objections.

1. The public administrator has not any interest in an estate which entitles him to object to the probate of a will.—*State ex rel. Eakins v. District Court et al.*, 226.

Special Administrators—Preference to Appointment.

2. Where there exists a legal cause for the appointment of a special administrator, the district court must, under section 2502 of the Code of Civil Procedure, appoint some one entitled to such appointment; and the selection of a public administrator to act as such officer, in preference to the widow of decedent who had been named as legatee and devisee in the will and as executrix thereof, was a violation of the provisions of the statute.—*State ex rel. Eakins v. District Court et al.*, 226.

PUBLIC LANDS.

See, also, Ejectment.

Powers of Land Department—Review of Decisions.

1. If the officers of the federal land department, to which tribunal is confided the power to determine rights growing out of settlements upon the public lands, err in the interpretation of the law applicable to the facts presented, or a fraud is practiced by one claimant upon another, or fraudulent practices are resorted to by the officers themselves, by reason of which title is granted to a party not entitled thereto, their action may be reviewed and annulled by a court of equity; but for mere errors of judgment upon the weight of the evidence produced before them in a given case, the only remedy is by appeal to the proper officer of the department, and the rulings then made are final and conclusive upon all courts.—*Kennedy v. Dickie*, 205.

Witnesses—False Testimony at Contest—Fraud—Courts—Immaterial Findings.

2. A finding made in an action in ejectment that plaintiff and other witnesses swore falsely at the trial of a contest in the federal land office over the land in question in the ejectment suit, is immaterial, since in order to justify a court in interfering with a conclusion reached by that department, the fraud in respect to which relief was sought by defendant by way of equitable counterclaim, must have been extrinsic and collateral to the matter tried by it and not in a matter tried upon its merits and upon which the decision was rendered.—*Kennedy v. Dickie*, 205.

Settlement—Noncompliance with Law—Who may Complain.

3. Where the federal government is willing that one who obtained land from the public domain without strict compliance with the law and the rules of the land department, should retain it, the individual citizen has no right to complain.—*Kennedy v. Dickie*, 205.

Mines—Conflicting Locations.

4. *Held*, that where the locator of a lode mining claim failed to comply with the requirements of the statute relative to completing his location after the posting of his declaratory statement, and another made a location conflicting with the claim of the prior discoverer, the area in conflict did not revert to the public domain, but inured to the benefit of the junior locator who, by performing the necessary work required by statute, became entitled to the possession of it.—*Helena Gold & Iron Co. v. Baggailey*, 464.

PUBLIC WORKS.

See Eight-hour Law.

QUANTUM MERUIT.

See Contracts, 5, 6.

RAILROADS.

See Eminent Domain, 1-23; Master and Servant, 9-17.

READING LAW TO JURY.

See Attorneys, 10, 11.

REAL PROPERTY.

Contracts—Conveyance—Breach—Measure of Damages—Pleadings—Complaint.

1. The measure of damages recoverable in an action for the breach of a contract to convey real property is, under section 4306 of the Civil Code, in the absence of bad faith on the part of the vendor, the price paid for the property, together with the expenses properly incurred in examining the title and preparing the necessary papers, with interest. Plaintiff in such an action sued to recover the amount paid by him to secure title, after discovering that defendant was unable to convey it. *Held*, that bad faith not having been alleged, recovery could only be had for the amount paid to defendant on the purchase price, together with incidental expenses, and that the court properly sustained defendant's objection to the introduction of any evidence by plaintiff for the reason that the complaint failed to state a cause of action.—Willard v. Smith, 494.

RECORD.

See, also, Appeal; Bill of Exceptions; New Trial; Transcript.
Amendment in supreme court, see Criminal Law, 74.

Appeal—New Trial—Statement—Rules.

1. Rule VII, section 3, of the Rules of the Supreme Court, provides that *unless otherwise ordered by the district court*, the testimony contained in the transcript shall be reduced to narrative form. In a statement on motion for a new trial presented for settlement to the district court, extensive portions of the testimony were produced by question and answer. Objection made to this by the adverse party was overruled. *Held*, that the action of the court in overruling the objection was equivalent to an order to have the matter appear in the form it did. Friel v. Kimberly-Mont. Gold M. Co., 54.

Criminal Law—Manner of Bringing up on Appeal.

2. The "record of the action" in a criminal case, as defined in Penal Code, section 2229, cannot be brought up on appeal in the body of a bill of exceptions.—State v. Morrison, 75.

Probate Proceedings—Appeals.

3. In the absence of specific provisions in the Code of Civil Procedure relating to new trials and appeals in probate proceedings as to the contents of the record in such cases, or the mode of authenticating it, the provisions regulating bills of exceptions, statements and appeals in ordinary actions are applicable and, so far as may be, the analogies between them must govern.—In re Dougherty's Estate, 336.

Probate Proceedings—Appeals—Judgment-roll.

4. While, technically, there is no judgment-roll in probate proceedings, the successive determinations of the court in the course of them, whenever directly or by implication declared by the statute to be final, must be regarded as final judgments, and the portions of the record upon which they are based must, on appeal, be regarded as the record for the particular determination.—*In re Dougherty's Estate*, 336.

Probate Proceedings—Administrators—Accounts—Settlement—Appeal.

5. On appeal from an order of the district court settling the account of an administratrix, the account, the written objections thereto, the findings, and order of the court, together with a certified copy of the notice of appeal, *held* to be the judgment-roll for the purpose of the appeal, and a sufficient record to entitle the appeal to consideration on its merits.—*In re Dougherty's Estate*, 336.

Criminal Law—Appeal—When Merits will not be Considered.

6. The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record, nor identified in any way by the certificate of the clerk of the district court or the trial judge.—*State v. Farriss*, 424.

Criminal Law—Appeal—Dismissal.

7. The supreme court will not hesitate to dismiss an appeal in a criminal case on the ground that the proper record is not before it, where appellant's attention had been called to the defect by the state's brief for a period of two months prior to the day of hearing, without any attempt on his part to have the record corrected so as to conform to the requirements of the statute.—*State v. Farriss*, 424.

Amendments—Continuance—Affidavits.

8. Unless the affidavits embodying facts necessary to move the discretion of the court on applications for leave to amend a complaint after commencement of the trial, and for a continuance, are made part of the record by bill of exceptions, properly settled, they may not be considered on appeal.—*Borden v. Lynch*, 503.

RELEASE.

See Assignment, 14.

REOPENING CASE.

See District Court, 17.

REPLEVIN.

See Claim and Delivery.

REPUTATION.

See Malicious Prosecution, 2, 6, 7.

RESCISSION.

See Contracts, 1, 2.

RES IPSA LOQUITUR.

See Personal Injuries, 3.

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RELEASE.

See Assignment, 1.

REOPENING CASE.

See District Court, 17.

REPLEVIN.

See Claim and Delivery.

REPUTATION.

See Malicious Prosecution, 2, 6, 7.

RESCISSION.

See Contracts, 1, 2.

RES IPSA LOQUITUR.

See Personal Injuries, 3.

ROBBERY.

See Criminal Law, 81, 82.

RULES OF DISTRICT COURT.

See District Courts, 4, 5, 6.

RULES OF SUPREME COURT.

See Briefs, 1, 2, 4, 5.

SAFE PLACE TO WORK.

See Personal Injuries, 1, 2, 3, 5, 7.

SALES.

Part Payment—Effect—Statute of Frauds—Principal and Agent.

1. Defendant in an action for the breach of a written contract had orally instructed his agent to sell a large number of cattle for him and to require payment of part of the purchase price. A purchaser was found, a check for \$5,000 as part payment accepted by the agent and placed to the credit of defendant in bank, and a written agreement entered into between the purchaser and the agent acting for defendant. Defendant thereafter refused to deliver the cattle, claiming that the agent had exceeded his authority, and that the contract was void in that the authority of the agent to make the sale was not in writing. *Held*, that payment of part of the purchase price brought the transaction within the exception provided for in section 3276 of the Code of Civil Procedure and sections 2185 and 2340 of the Civil Code, relative to contracts which must be in writing, and that therefore the provisions of section 3085 of the Civil Code, declaring that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing, has no application and that the contract was valid.—*Case et al. v. Kramer*, 142.

Principal and Agent—Payment—Checks.

2. While an agent authorized to receive payment of money should accept cash only, yet where one employed to sell cattle accepted as part payment a check payable to the order of the principal, indorsed it for collection and subsequently cashed it and placed the money in bank to the credit of his principal, the latter cannot complain, and it is immaterial that the check, made payable to the principal, had been indorsed in his name for collection by the agent without special authority to that effect, inasmuch as the principal actually received the money.—*Case et al. v. Kramer*, 142.

Personal Property—Delivery—Evidence—Sufficiency.

3. Evidence, in an action to recover for the breach of a guaranty to deliver certain personal property, which showed that the goods had been sold to one M., who took possession and transferred the bill of sale evidencing the transaction to one P., with the indorsement that he would "guarantee delivery of same"; that P. resold the property, and that thereafter he found a claim outstanding against certain of the goods and told his grantee to keep the property, that he would satisfy the claim and did so,—in the absence of anything to show that P., prior to reselling, had taken possession, or if he attempted to do so, had been prevented from doing it, was insufficient to show a breach of the guaranty to deliver the property sold, since the only reasonable inference that could be drawn from it was that

P. (plaintiff) or his grantee had actually secured possession.—*Pincus v. Muntzer*, 498.

Bill of Sale—Guaranteeing Delivery—Warranty.

4. An indorsement on a bill of sale by the buyer of personal property on a resale thereof that he would "guarantee delivery of same" does not constitute a warranty of title.—*Pincus v. Muntzer*, 498.

Personal Property—Warranty of Title—Statutes of Limitations.

5. Where the transfer of personal property was evidenced by a bill of sale, to which the purchaser, upon reselling the goods, added an indorsement guaranteeing delivery, but not expressly warranting title, the language of section 2372 of the Civil Code, which provides that the seller of goods impliedly warrants a good title, may not be read into the indorsement and thereby a written warranty created, so as to make the statutory limitation of eight years, mentioned in section 512 of the Code of Civil Procedure, in which an action on a contract founded upon a written instrument must be brought, applicable to a suit for a breach of a warranty of title to the property sold.—*Pincus v. Muntzer*, 498.

SCHOOL TRUSTEES.

See Free County High Schools.

SELF-DEFENSE.

See Criminal Law, 38, 39, 40, 67, 68.

SETOFF.

See Eminent Domain, 19.

SHERIFFS.

Deeds, see Mortgages, 5.

Officers—Successors.

1. Any sheriff succeeding his predecessor, whether immediately or not, is the latter's "successor" within the meaning of that term as used in section 1237 of the Code of Civil Procedure.—*McCauley v. Jones*, 375.

SIDEWALKS.

See Personal Injuries, 20, 28, 29, 30.

SPECIAL ADMINISTRATORS.

See, also, Probate Proceedings, 7.

Preference to Appointment—Public Administrators.

1. Where there exists a legal cause for the appointment of a special administrator, the district court must, under section 2502 of the Code of Civil Procedure, appoint some one entitled to such appointment; and the selection of a public administrator to act as such officer, in preference to the widow of decedent who had been named as legatee and devisee in the will and as executrix thereof, was a violation of the provisions of the statute.—*State ex rel. Eakins v. District Court et al.*, 226.

Appointment—Objections—Waiver—District Courts—Jurisdiction.

2. The mere fact that the widow of testator asked that she be appointed special administratrix of the estate of decedent, when a legal cause for the appointment of such officer did not exist, did not estop

her to object to the appointment of another, or confer jurisdiction upon the court to appoint another.—State ex rel. Eakins v. District Court et al., 226.

SPECIAL FINDINGS.

See Findings.

SPECIFICATIONS OF ERROR.

See Briefs, 1, 2, 3.

STATE EXAMINER.

See Banks, 1, 2, 3.

STATUTES AND STATUTORY CONSTRUCTION.

See, also, Bills of Exceptions, 2; Eight-hour Law.

Construction—Telephones—Highways—Constitution.

1. Any Act placed upon the statute books in obedience to the command of the Constitution (Article XV, section 14), that such reasonable regulations shall be provided by law as to give full effect to the grant contained in said instrument conferring the right to place poles and other fixtures, necessary for the carrying on of a telegraph or telephone business in the public highways, upon any person or corporation wishing to engage in it, must not only be a general one of uniform operation, but one which will give *full*, not partial, effect to such constitutional grant.—State ex rel. Crumb v. City of Helena et al., 67.

Construction—Telephones—Municipal Corporations—Highways—Constitution.

2. *Held*, that chapter 55 of the Session Laws of 1905 (Laws of 1905, p. 122), authorizing any person or corporation desirous of engaging in the telegraph, telephone, electric light or power business, to construct the necessary poles and appliances along and upon any of the public highways, but adding that "the provisions of this Act shall not apply to public roads and highways within the limits of incorporated cities or towns," is, as to this proviso, invalid, in that by its insertion the carrying on of such business would practically be confined to country districts, contrary to the purpose of the constitutional grant (Article XV, section 14) with respect to this subject.—State ex rel. Crumb v. City of Helena et al., 67.

Construction—Telephones—Cities and Towns—Highways.

3. Subdivision 43 of section 4800 of the Political Code, as amended by Session Laws of 1897, page 203, which confers upon city or town councils the power to regulate the erection of poles, the stringing of wires, etc., within the corporate limits, does not supplement Chapter 55 of the Laws of 1905 (Laws of 1905, p. 122), so as to render valid the proviso of the latter Act, to-wit, that the right granted to persons desiring to engage in the telegraph or telephone business to erect the necessary appliances in the public highways does not apply to roads and highways within the limits of cities or towns, since upon failure of such body to legislate upon the subject, it may not be coerced into action.—State ex rel. Crumb v. City of Helena et al., 67.

Telephones—Regulation—Cities and Towns.

4. *Obiter*: After the legislature has complied with the constitutional mandate to provide by general law such reasonable regulations as will give full effect to the grant authorizing the construction and

maintenance of telegraph and telephone lines within the state (Constitution, Article XV, section 14), it may empower cities and towns to enact such reasonable regulations for the conduct of such business as may be considered necessary.—*State ex rel. Crumb v. City of Helena et al.*, 67.

Constitution—Title—State and County Boards of Health.

5. Sections 11, 25 and 26 of House Bill No. 104 (Laws 1901, p. 80), the purpose of which Act, as expressed in the title, was to form a state board of health, define its powers and duties and provide for the compensation of its officers and for the enforcement of its rules, while the body of the statute, among other things, confers upon county boards of health power to declare quarantine against contagious diseases and confine persons affected with such diseases in suitable detention hospitals, power for the erection of which is also granted, are unconstitutional as in contravention of Article V, section 23, of the Constitution, which declares that no bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in its title.—*Yegen v. Board of County Commissioners et al.*, 79.

Construction—Review—Constitution.

6. In construing legislation the supreme court will not inquire whether it is good or bad, moral or immoral in its tendencies, the legislature being the exclusive judge, within the limitations of the Constitution, as to the advisability of enacting a particular bill into law, and its judgment and discretion in the performance of its duties may not be reviewed by the courts.—*Yegen v. Board of County Commissioners et al.*, 79.

Construction—Implied Repeal.

7. Where a former Act upon a certain subject is not referred to in a subsequent statute, although the provisions of the first are substantially embodied in the later one, it will be held that it was not the purpose of the legislature to repeal it or set it aside.—*Yegen v. Board of County Commissioners et al.*, 79.

County Commissioners—Powers—Detention Hospitals.

8. Under Political Code, section 4230, the board of county commissioners has not the power to erect and maintain a detention hospital, for persons affected with contagious or pestilential diseases, at the expense of the county, subsection 7 thereof, which confers authority to provide "necessary county buildings," referring simply to such buildings as may be required for ordinary county purposes, and subsection 9, under which a hospital may be constructed, having reference to a hospital for the indigent sick.—*Yegen v. Board of County Commissioners et al.*, 79.

Foreign Wills—Probate.

9. While the Code of Civil Procedure does not in express terms provide for the probate of a will executed in another state, it does so impliedly by section 2351, which makes provision for a hearing of such application and notice thereof.—*State ex rel. Ruef v. District Court et al.*, 96.

Prohibition—Justice of the Peace Courts—Appeal—Requisites—Jurisdiction.

10. A notice of appeal from a justice of the peace to the district court was served on counsel for the opposite party on one day and not filed in the justice's court until three days later. A motion to dismiss the appeal on the ground that it had not been filed and served in accordance with the provisions of Code of Civil Procedure, section

1760, was overruled by the district court. *Held*, on application for writ of prohibition, that under this section the filing of the notice in the justice's court must precede, or be contemporaneous with, the service thereof on the adverse party or his counsel, and that by the failure of the appellant to observe the mandate of this section, the district court was not invested with jurisdiction of the cause.—*State ex rel. Hall et al. v. District Court et al.*, 112.

Appeals—Justice of the Peace Courts.

11. Appeals from justice of the peace to district courts are matters of statutory regulation, and the provisions of the law relative to the method to be pursued in taking such appeals must be strictly followed in order to divest the former of and invest the latter with jurisdiction. *State ex rel. Hall et al. v. District Court et al.*, 112.

Construction.

12. The arrangement of the Codes into Divisions, Parts, Titles, Chapters, Articles and Sections is one of the instrumentalities by which the Codes may be construed, and the particular title of each of these subdivisions may be considered in determining the meaning of such subdivisions.—*Hardesty v. Largey Lumber Co.* (on rehearing), 151.

Construction.

13. All sections of a Code upon the same subject matter must be taken as one law and construed together.—*Hardesty v. Largey Lumber Co.* (on rehearing), 151.

Master and Servant—Personal Injuries—Instructions.

14. *Held*, that sections 2660, 2661, and 2662 of the Civil Code, each of which refers to the "Obligations of the Employer"—the title of the article comprising the sections—are directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment; and that instructions given in such an action embodying these sections were properly submitted.—*Hardesty v. Largey Lumber Co.* (on rehearing), 151.

Constitution—Statutes of Limitations.

15. Under Constitution, Article V, section 24, requiring, among other things, that no bill shall become a law unless the names of the members in each House voting be entered on the journal, the act of March 11, 1901 (Laws 1901, p. 157), relating to "the limitation of time within which actions may be brought," did not become a law, it appearing from the journal of the Senate that the names of the members of that branch of the Seventh Legislative Assembly voting on the measure were not entered on the journal.—*Palatine Insurance Co. v. Northern Pac. Ry. Co.*, 268.

Enactment—Constitution—Evidence.

16. The journal of either House of the legislature imports verity, and may be looked to to determine whether or not a bill, valid on its face, signed by the presiding officer of each House, approved by the Governor and deposited in the office of the Secretary of State, was in fact passed in compliance with the requirements of section 24, Article V of the Constitution.—*Palatine Insurance Co. v. Northern Pac. Ry. Co.*, 268.

Amendment by Title—Constitution.

17. *Held*, that section 524 of the Code of Civil Procedure, being Act of 1893, approved March 9, relating to limitation of time within which certain actions must be brought, made a part of the Codes of 1895 by section 5186, was not an amendment of the Act of 1893, but

recognized as the law of the land by the legislature and simply continued in force as such, and that therefore section 25, Article V of the Constitution providing that no bill shall be amended by title only has no application.—*Palatine Insurance Co. v. Northern Pac. Ry. Co.*, 268.

Bills of Exceptions—Retroactive Effect.

18. The Act of 1905 (Laws 1905, c. 92, p. 185), amending sections 1152 and 1173 of the Code of Civil Procedure, so as to dispense with the specification of particulars, in bills of exceptions and statements on motion for new trial, in which the evidence is alleged to be insufficient to justify the verdict or decision, has no application to bills or statements settled prior to its enactment.—*Martin v. Corscadden*, 308.

Constitutionality—Title—Penalty Clause.

19. A penalty clause may be incorporated in an Act without being designated in its title, and such provision is not in violation of the constitutional inhibition (Constitution, Art. V, sec. 23), that no bill containing more than one subject shall become a law, which subject shall be clearly expressed in the title of the bill.—*In re Terrett*, 325.

Construction—Legislative Intent.

20. In construing a section or sections of a statute, the intention of the legislature is to be gathered from the entire Act, irrespective of its division into sections, made for convenience only.—*In re Terrett*, 325.

Title—Penalty Clause—Bounty Certificates—Forgery.

21. *Held*, that sections 3078 and 3079 of the Political Code, providing in substance, respectively, that a person falsely making, altering, forging or counterfeiting a bounty certificate shall be guilty of forgery, and that one doing certain acts with relation to such certificates with intent to defraud the state, shall be guilty of a misdemeanor, each section providing penalties, together constitute the penalty clause of the Act entitled "An Act to Provide a Bounty on Certain Stock-destroying Animals and a Fund for the Payment Thereof" (Pol. Code, secs. 3070-3080), and that, since, a penalty clause may be incorporated in an Act without being designated in its title, the legislation is not invalid because the provisions of section 3078 were not particularly set out in the title of the statute.—*In re Terrett*, 325.

Bounties—Validity—Title—Constitution.

22. Act of March 6, 1903 (Laws 1903, p. 166), amendatory of sections 3070-3073 of the Political Code relative to bounties on certain stock-destroying animals, and which sought to amend section 1124 of the Penal Code, also referring to bounties, but theretofore repealed (Laws 1897, p. 249), while of no effect as to the attempted amendment of repealed section 1124, is valid and not unconstitutional, for the alleged reason that its title contains more than one subject.—*In re Terrett*, 325.

Validity—Title.

23. The Act of March 6, 1903 (Laws 1903, p. 166), amending sections 3070-3073 of the Political Code relative to bounties on wild animals, and providing for bounty inspectors to examine the hides and issue the certificates, whereas in the former Act the county clerk was the officer to do so, is not invalid, in that it provides an entirely new set of officers to administer the law and therefore is broader than the original Act and broader than its own title—since the provisions of the amendatory Act are germane to the subject treated in the

original Act, and under its title any provision could be inserted relative to officers to carry out its provisions which might have been incorporated in the original Act under its title.—*In re Terrett*, 325.

Forgery—Bounty Certificates—Who may Raise Questions of Validity.

24. A person appointed to act as bounty inspector under the provisions of Act of March 6, 1903 (Laws 1903, p. 166), and who, while acting as such was charged with forgery of bounty certificates, he having thus been at least a *de facto* officer, will not be heard to raise the question of the invalidity of the Act on the ground that it imposes duties upon district judges in the selection of three representative stockgrowers to appoint bounty inspectors not judicial in character.—*In re Terrett*, 325.

Bounty Inspectors—Appointment—Constitution—District Judges.

25. Since bounty inspectors, provision for whose appointment is made in Act of March 6, 1903 (Laws 1903, p. 166), are not officers whose appointment is "otherwise provided for" in the Constitution (Const., Art. VII, sec. 7), the legislature had the power to delegate the selection of three stockgrowers in each county to appoint bounty inspectors, to the district judges.—*In re Terrett*, 325.

Construction—Banks—State Examiner.

26. Chapter C, Laws of 1903, page 184, relating to the state examiner and providing penalties for failure of banks, investment companies, etc., to comply with its requirements, must be strictly construed.—*State v. Aetna Banking & Trust Co.*, 379.

Appeal—Constitutional Questions—Determination.

27. The constitutionality of a statute will not be inquired into by the supreme court, if an inquiry into that question is not necessary to a decision of the particular case before it.—*State v. Aetna Banking & Trust Co.*, 379.

Foreign Banking Companies—State Examiner—Construction—Elimination—Result.

28. The proviso in section 15 of the Act of 1905 (Laws 1905, Chap. 104, p. 232),—which Act regulates, among others, foreign banking corporations doing business in the state,—to the effect that the legislation shall not apply to any such concerns doing business in the state openly and lawfully at a fixed place at the time of its approval, may not be eliminated, if invalid, so as to permit the remainder of the Act to stand, since it is not apparent that the proviso was not an inducement to the legislature in passing the Act, and by elimination of the proviso by judicial construction, such a corporation would be made amenable to the penalties provided by the Act, contrary to the desire of the legislature at the time of its passage.—*State v. Aetna Banking & Trust Co.*, 379.

Foreign Banking Companies—State Examiner—Construction.

29. *Held*, that foreign banking corporations doing business in this state were not intended by the legislature to be included within the provisions of section 497 of the Political Code, as amended by Act of 1903 (Laws 1903, Chap. C, p. 184), which creates the state examiner's fund and imposes upon "each bank, banking corporation, savings bank, investment and loan company, incorporated under the laws of this state" the duty of paying into this fund certain fees; and that, therefore, such a concern is not subject to the penalties prescribed in section 498 for a noncompliance with the provisions of section 497.—*State v. Aetna Banking & Trust Co.*, 379.

Taxation—Banks—Deduction of Deposits.

30. The provisions of section 3695, subdivision 8, Political Code, providing for a deduction of deposits (debts) in the hands of private bankers for purposes of taxation, from moneys on hand and in transit, and that only deposits other than current deposits may be deducted from bills and accounts receivable and other credits, and those of section 3701, authorizing any taxpayer to deduct from his credits all debts then owing by him, which section is applicable alike to all taxpayers, whether natural persons or corporations, are in direct conflict, and therefore, under section 5165 of the same Code, the latter must prevail.—Clark et al. v. Maher et al., 391.

Banks—Assessment—Constitution.

31. That portion of subdivision 8 of section 3695, Political Code, granting to private bankers the right to deduct their deposits (debts) from moneys on hand, for purposes of assessment, is violative of Article XII, sections 11 and 16, providing, respectively, that taxes "shall be uniform upon the same class of subjects," and that "all property shall be assessed in the manner prescribed by law," etc.—Clark et al. v. Maher et al., 391.

Counterclaim—Pleading.

32. Held, that section 981 of the Code of Civil Procedure, providing that where a defendant interposes a counterclaim and demands affirmative relief against the plaintiff, his right to the relief is the same as in an action against the plaintiff directly, and that the defendant shall be deemed plaintiff and the plaintiff the defendant, is applicable only to Title VII, which has to do with provisional remedies in civil actions and not with questions of pleading, controlled by Title VI of that Code.—Gilechrist v. Hore et al., 443.

Intoxicating Liquors—Licenses—Constitutional Objections.

33. Chapter 82, Session Laws of 1905, page 174, is not obnoxious to constitutional principles, in that it grants to the board of county commissioners authority to act capriciously in the matter of granting or refusing licenses to sell intoxicating liquors, the discretion in that Act conferred upon them being a fair administrative one, and the mere fact that the power vested in them may be abused being no valid objection to the legislation.—State ex rel. Bray v. Settles, County Treasurer, 448.

Penal—Construction—Indefiniteness—Legislative Intent.

34. A statute, though penal in character, will not be held invalid because of the indefinite language in which it is couched, if the purpose or intent which the legislature had in mind in enacting it can be ascertained.—State v. Livingston C. B. & M. Co., 570.

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STATUTE OF FRAUDS.

Contracts of Sale—Part Payment—Effect—Principal and Agent.

1. Defendant in an action for the breach of a written contract had orally instructed his agent to sell a large number of cattle for him and to require payment of part of the purchase price. A purchaser was found, a check for \$5,000 as part payment accepted by the agent and placed to the credit of defendant in bank, and a written agreement entered into between the purchaser and the agent acting for defendant. Defendant thereafter refused to deliver the cattle, claiming that the agent had exceeded his authority, and that the contract was void in that the authority of the agent to make the sale was not in writing. *Held*, that payment of part of the purchase price brought the transaction within the exception provided for in section 3276 of the Code of Civil Procedure and sections 2185 and 2340 of the Civil Code, relative to contracts which must be in writing, and that therefore the provisions of section 3085 of the Civil Code, declaring that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing, has no application and that the contract was valid.—*Case et al. v. Kramer*, 142.

Brokers—Contracts—Pleadings—Proof.

2. Though a contract authorizing a broker to sell real estate must be in writing and subscribed by the party to be charged or his agent (Civil Code, sec. 2185, subsec. 6), the fact that it is in writing is a matter of proof and not of allegation in pleading.—*Blankenship et al. v. Decker et al.*, 292.

STATUTES OF LIMITATIONS.

Judgment on Pleadings—Dismissal—Effect—New Action.

1. Where the district court entered judgment on the pleadings in favor of defendant in a suit for money had and received, upon the presumption that a judgment of dismissal in a former suit on the same cause of action had been rendered on the merits and that, therefore, the second action was barred, the judgment-roll in the first action not being before the court at the time, it erred in that, under section 1007 of the Code of Civil Procedure, a judgment of dismissal is not a bar to a new action unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment-roll.—*Glass et al. v. Basin & Bay State M. Co.*, 88.

Judgment of Dismissal—Affirmance—New Action.

2. Where in a suit for money had and received, a judgment of dismissal on the pleadings had been affirmed on appeal, it was terminated by such affirmance in a manner other than those mentioned in section 547 of the Code of Civil Procedure, and a second suit on the same cause of action, brought within a year after such termination, was not barred.—*Glass et al. v. Basin & Bay State M. Co.*, 88.

Enactment of Statutes—Constitution.

3. Under Constitution, Article V, section 24, requiring, among other things, that no bill shall become a law unless the names of the members in each House voting be entered on the journal, the act of March 11, 1901 (Laws 1901, p. 157), relating to "the limitation of time

within which actions may be brought," did not become a law, it appearing from the journal of the Senate that the names of the members of that branch of the Seventh Legislative Assembly voting on the measure were not entered on the journal.—*Palatine Insurance Co. v. Northern Pac. Ry. Co.*, 268.

Statutes—Amendment by Title—Constitution.

4. Held, that section 524 of the Code of Civil Procedure, being Act of 1893, approved March 9, relating to limitation of time within which certain actions must be brought, made a part of the Codes of 1895 by section 5186, was not an amendment of the Act of 1893, but recognized as the law of the land by the legislature and simply continued in force as such, and that therefore section 25, Article V of the Constitution providing that no bill shall be amended by title only has no application.—*Palatine Insurance Co. v. Northern Pac. Ry. Co.*, 268.

Written Obligations.

5. The instrument in writing mentioned in section 512 of the Code of Civil Procedure as the foundation of a contract for the breach of which an action must be brought within eight years, is one which in itself contains a contract to do the particular thing for the non-performance of which the action is brought, and not one which by implication may be said to be in writing.—*Pincus v. Muntzer*, 498.

Sales—Personal Property—Warranty of Title.

6. Where the transfer of personal property was evidenced by a bill of sale, to which the purchaser, upon reselling the goods, added an indorsement guaranteeing delivery, but not expressly warranting title, the language of section 2372 of the Civil Code, which provides that the seller of goods impliedly warrants a good title, may not be read into the indorsement and thereby a written warranty created, so as to make the statutory limitation of eight years, mentioned in section 512 of the Code of Civil Procedure, in which an action on a contract founded upon a written instrument must be brought, applicable to a suit for a breach of a warranty of title to the property sold.—*Pincus v. Muntzer*, 498.

SUPERVISORY CONTROL.

See *Eminent Domain*, 7.

SUPREME COURT.

See *Briefs*; *Record*; *Rules of Supreme Court*; *Transcript*.

SURETIES.

See *Appeal*, 70, 72; *Notaries Public*, 1-4.

TAXATION.

Free County High Schools—Trustees—Injunction.

1. The complaint in an action by a taxpayer to enjoin the trustees of a free county high school—claimed to have been established contrary to law (Laws 1899, p. 59; Laws 1901, p. 6)—from presenting to the board of county commissioners an estimate of the tax rate required to raise the funds necessary for buildings, teachers and necessary apparatus, alleged that if permitted to certify such rate to the board of commissioners it would levy the same on all taxable property in the county which in effect would constitute a lien on such property including plaintiff's. *Held*, that a general demurrer was properly sustained in that it did not appear that the plaintiff was suffering or was

about to suffer any injury for which he had not an adequate remedy; that the action was prematurely brought, inasmuch as the commissioners had not assumed to levy the tax, and that if they should proceed to act, plaintiff would have a remedy by appeal to the district court.—*Morse v. Jacky et al.*, 165.

Free County High Schools—Board of Trustees—Not Part of Taxing Power.

2. The board of trustees of a free county high school (Laws 1899, p. 59; Laws 1901, p. 6), required by law to certify to the board of county commissioners an estimate of the tax rate necessary to raise the funds for the establishment thereof, is not by such requirement made a part of the taxing power.—*Morse v. Jacky et al.*, 165.

Banks—Deduction of Deposits—Statutes.

3. The provisions of section 3695, subdivision 8, Political Code, providing for a deduction of deposits (debts) in the hands of private bankers for purposes of taxation, from moneys on hand and in transit, and that only deposits other than current deposits may be deducted from bills and accounts receivable and other credits, and those of section 3701, authorizing any taxpayer to deduct from his credits all debts then owing by him, which section is applicable alike to all taxpayers, whether natural persons or corporations, are in direct conflict, and therefore, under section 5165 of the same Code, the latter must prevail.—*Clark et al. v. Maher et al.*, 391.

Banks—Assessment—Constitution—Statutes.

4. That portion of subdivision 8 of section 3695, Political Code, granting to private bankers the right to deduct their deposits (debts) from moneys on hand, for purposes of assessment, is in violation of Article XII, sections 11 and 16, providing, respectively, that taxes "shall be uniform upon the same class of subjects," and that "all property shall be assessed in the manner prescribed by law," etc.—*Clark et al. v. Maher et al.*, 391.

Banks—Assessment—Deduction of Deposits—Demand.

5. Where a bank had made timely demand to have its deposits (debts) deducted from its credits, for assessment purposes, it was entitled to such deduction, under Political Code, section 3701, although it mistakenly also requested a like deduction from the moneys on hand, under subdivision 8, section 3695 of the same Code.—*Clark et al. v. Maher et al.*, 391.

Duty of Assessor.

6. It is the duty of the assessor to make an assessment according to law, and not in accordance with what the person whose property is about to be assessed thinks the law is or ought to be.—*Clark et al. v. Maher et al.*, 391.

Valid Assessment—Requisites.

7. A valid assessment is an indispensable prerequisite to a valid tax; and in order that an assessment may be said to be valid, there must have been a listing of persons and property, and an estimating and fixing of the value of the property.—*Clark et al. v. Maher et al.*, 391.

Assessment—By Whom it Must be Made.

8. An assessment may only be made by the officers charged with that duty, and cannot be made by the court.—*Clark et al. v. Maher et al.*, 391.

Banks—Assessment.

9. The fact that a bank had moneys on hand and in transit to the amount of \$403,869.27, subject to taxation, but which sum was not

assessed under a mistaken idea of the law, did not justify the imposition of taxes upon \$1,529,940 credits, of which amount, after deduction of the bank's just debts, nothing remained liable to taxation. *Clarke et al. v. Maher et al.*, 391.

Banks—Assessment—Collection—Tender—Injunction.

10. Because a bank had not paid or offered to pay taxes upon moneys on hand and in transit, not assessed to it, the remedy of injunction to restrain the collection of taxes illegally levied upon other of its property, not subject to taxation, may not be denied it, since, an assessment by the proper officers being necessary to a tax, and none having been made, there was nothing for it to pay or tender.—*Clark et al. v. Maher et al.*, 391.

TELEPHONES.

Construction and Maintenance—Constitution—Self-executing Provisions.

1. Section 14, Article XV of the Constitution granting to any person or corporation the right to construct or maintain telegraph and telephone lines within this state, and providing that the legislature shall by general law enact reasonable regulations to give full effect to such grant, is not self-executing.—*State ex rel. Crumb v. City of Helena et al.*, 67.

Poles and Fixtures—Highways—Obstruction—Constitution.

2. In the absence of legislation making the grant contained in section 14, Article XV of the Constitution, relative to the right of any person to construct and maintain telegraph and telephone lines within this state, effective, the placing of poles and other fixtures, necessary for such business, in the public highways would constitute an unlawful obstruction thereof.—*State ex rel. Crumb v. City of Helena et al.*, 67.

Construction—Highways—Constitution—Statutes.

3. Any Act placed upon the statute books in obedience to the command of the Constitution (Article XV, section 14), that such reasonable regulations shall be provided by law as to give full effect to the grant contained in said instrument conferring the right to place poles and other fixtures, necessary for the carrying on of a telegraph or telephone business in the public highways, upon any person or corporation wishing to engage in it, must not only be a general one of uniform operation, but one which will give *full*, not partial, effect to such constitutional grant.—*State ex rel. Crumb v. City of Helena et al.*, 67.

Construction—Municipal Corporations—Highways—Constitution—Statutes.

4. *Held*, that chapter 55 of the Session Laws of 1905 (Laws of 1905, p. 122), authorizing any person or corporation desirous of engaging in the telegraph, telephone, electric light or power business, to construct the necessary poles and appliances along and upon any of the public highways, but adding that "the provisions of this Act shall not apply to public roads and highways within the limits of incorporated cities or towns," is, as to this proviso, invalid, in that by its insertion the carrying on of such business would practically be confined to country districts, contrary to the purpose of the constitutional grant (Article XV, section 14) with respect to this subject.—*State ex rel. Crumb v. City of Helena et al.*, 67.

Telephones—Construction—Cities and Towns—Highways—Statutes.

5. Subdivision 43 of section 4800 of the Political Code, as amended by Session Laws of 1897, page 203, which confers upon city or town councils the power to regulate the erection of poles, the stringing of wires, etc., within the corporate limits, does not supplement chapter

55 of the Laws of 1905 (Laws of 1905, p. 122), so as to render valid the proviso of the latter Act, to-wit, that the right granted to persons desiring to engage in the telegraph or telephone business to erect the necessary appliances in the public highways does not apply to roads and highways within the limits of cities or towns, since upon failure of such body to legislate upon the subject, it may not be coerced into action.—State ex rel. Crumb v. City of Helena et al., 67.

Construction and Maintenance—Regulation—Cities and Towns.

6. *Obiter*: After the legislature has complied with the constitutional mandate to provide by general law such reasonable regulations as will give full effect to the grant authorizing the construction and maintenance of telegraph and telephone lines within the state (Constitution, Article XV, section 14), it may empower cities and towns to enact such reasonable regulations for the conduct of such business as may be considered necessary.—State ex rel. Crumb v. City of Helena et al., 67.

TERMS OF COURT.

See District Courts, 1-3.

THEORY OF CASE.

See, also, Master and Servant, 18, 28.

District Courts—Instructions.

1. The district court, in charging the jury, may not disregard the theory of the case at issue entertained by either party.—Donovan-McCormick Co. v. Sparr, 237.

THREATS.

See Criminal Law, 30, 36, 37.

TRANSCRIPT.

See, also, Record.

Failure to File in Time—Dismissal.

1. Appeal dismissed where transcript on appeal was not filed in time. Poindexter & Orr Live St. Co., v. Flynn et al.; Flynn et al. v. Poindexter & Orr Live St. Co., 613.

TRESPASS.

Live Stock—Uninclosed Lands.

1. One who knowingly and willfully drives his stock upon uninclosed lands of another is guilty of a trespass and must respond in damages at the suit of the latter.—Musselshell Cattle Co. v. Woolfolk et al., 126.

Continued—Live Stock—Uninclosed Lands—Injunction.

2. While equity will not enjoin the commission of a trespass when there is an adequate remedy at law, yet where it appeared that the defendants willfully and repeatedly, though warned to desist, drove bands of sheep upon plaintiff's uninclosed land, thereby depasturing it and causing water necessary for plaintiff's cattle to be consumed, and threatened to continue such trespasses, and where the record on appeal showed that plaintiff's title to the land in question was not controverted, the trial court was justified in granting a temporary injunction in view of the probable impossibility of accurately estimating the damages in money and to prevent a multiplicity of suits, and its order refusing to dissolve it was correct.—Musselshell Cattle Co. v. Woolfolk et al., 126.

TRIAL.

District Courts—Commenting on Evidence.

1. Where, on a prosecution for murder, the trial court casually remarked, when a transcript of the evidence taken at the coroner's inquest was offered in defendant's behalf for impeachment purposes, that it was admitted for "what it was worth," such remark was not prejudicial to the defendant as a comment upon the weight of the evidence so offered.—*State v. Fuller*, 12.

District Courts—Decorum.

2. The district court should see that the trial of a cause is conducted in an orderly and decorous manner, and neither counsel nor witnesses should be permitted to violate the proprieties of the courtroom with impunity.—*State v. Trueman*, 249.

Reception of Evidence—Timely Objection.

3. An objection to evidence not made until after it has been admitted is too late, and, though erroneously admitted, the court is not then bound to strike it out.—*Martin v. Corcadden*, 308.

Amendments—Continuance—Judgment-roll.

4. Under sections 1151 and 1196 of the Code of Civil Procedure, an order permitting an amendment to the complaint and refusing a continuance after the jury had been sworn is a part of the judgment-roll.—*Borden v. Lynch*, 503.

Amendments—Continuance—District Courts—Discretion.

5. Applications for permission to amend a complaint after commencement of the trial, and for a continuance, are addressed to the discretion of the court.—*Borden v. Lynch*, 503.

Amendments—Continuance—Affidavits—Record.

6. Unless the affidavits embodying facts necessary to move the discretion of the court on application for leave to amend a complaint after commencement of the trial, and for a continuance, are made part of the record by bill of exceptions, properly settled, they may not be considered on appeal.—*Borden v. Lynch*, 503.

Rulings on Evidence—Exceptions—Review.

7. Errors alleged to have been committed by the trial court in excluding offered testimony will not be considered on appeal, unless proper exceptions were reserved to the rulings or decisions complained of.—*Borden v. Lynch*, 503.

UNDERTAKINGS ON APPEAL.

See Appeal, 52, 53, 54, 70, 71, 72.

UNITED STATES MAIL.

See Life Insurance, 5.

VENUE.

See Criminal Law, 26, 27, 28; Change of Venue.

VICE-PRINCIPAL.

See Master and Servant, 5, 6.

WAIVER.

See, also, Evidence, 3.

Appeal—Assignments not Argued.

1. Assignments of error not argued or discussed by counsel on appeal will be deemed waived.—*Anderson v. Northern Pac. Ry. Co. et al.*, 181.

Forgery—Information—Insufficiency.

2. Defendant, charged with forgery, entered a plea of not guilty. At the trial his counsel objected to the introduction of any testimony on the ground that the information was indefinite, unintelligible and uncertain. *Held*, that defendant, by his plea to the merits, waived any objection to the information on this ground.—*State v. Newman*, 434.

WARRANTY.

See Sales, 4, 6.

WATERS AND WATER RIGHTS.**Spring and Seepage Waters—Implied and Inconsistent Findings.**

1. Where, in a suit to determine water rights, the court expressly found that certain spring and seepage water had its rise in the bed of a creek the waters of which flowed into a river to which it was a tributary, and that the creek water flowed into such river at all times above the head of a certain ditch, a finding that such spring or seepage water would not, if permitted to flow uninterruptedly, reach the head of said ditch, would be inconsistent with the other findings, and may, therefore, not be implied.—*Beaverhead Canal Co. v. Dillon El. L. & P. Co. et al.*, 135.

Increase of Supply by Artificial Means—Presumptions.

2. Where, in a water right suit, it did not appear that certain spring or seepage water having its rise in the bed of a creek, was so made to rise by artificial means, and in the absence of a finding to that effect, the presumption will obtain that such water forms a part of the natural supply of the creek.—*Beaverhead Canal Co. v. Dillon El. L. & P. Co. et al.*, 135.

Increase of Supply—Spring and Seepage Water.

3. The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water or so much thereof as naturally flows in the stream and its tributaries above the head of his ditch, unimpaired and unaffected by any subsequent change wrought by nature, such as spring or seepage water rising in the bed of the stream, extraordinary rain or snow fall and the like.—*Beaverhead Canal Co. v. Dillon El. L. & P. Co. et al.*, 135.

Increase by Artificial Means—Rights of Prior and Subsequent Appropriators.

4. *Obiter*: A person who by his own exertions and by artificial means increases the flow of water in a stream has the first right to such increased supply, and as against him a prior appropriator of water on the stream may not claim any interest in the additional water so caused to flow.—*Beaverhead Canal Co. v. Dillon El. L. & P. Co. et al.*, 135.

Spring and Seepage Waters—Rights of Senior and Junior Appropriators.

5. Where certain spring and seepage waters come to the surface in the bed of a creek, tributary to a river from which a prior appropriation has been made, and during the irrigating season the creek runs dry below the springs and before it reaches the river, the prior appropriator cannot complain if the waters so having their rise in the bed of the creek and which would otherwise be lost, be used by a

subsequent appropriator.—*Beaverhead Canal Co. v. Dillon El. L. & P. Co. et al.*, 135.

District Courts—Contempt.

6. The proper way for a district court to enforce its order theretofore made adjusting water rights between claimants entitled thereto is by contempt proceedings, upon the filing of an affidavit showing a disregard of the order.—*State ex rel. Pew v. District Court et al.*, 233.

Certiorari—Injunction—District Courts—Jurisdiction—Due Process of Law.

7. *Held*, on *certiorari*, that the district court exceeded its jurisdiction in making an order, in a summary proceeding and with notice of less than twenty-four hours, which to all intents and purposes enjoined a person from interfering with certain water rights theretofore adjusted between various claimants in an action to which the person so enjoined was not a party; that, if a trespasser, injunction against him could only be had after a hearing in a regular action; and that the adjudication of his rights as made by the order was without due process of law.—*State ex rel. Pew v. District Court et al.*, 233.

Certiorari—Contempt—Injunction—Judicial Districts—Jurisdiction.

8. Certain water rights were adjudicated between the various claimants and an injunction issued restraining all parties to the action from interfering with each other's rights, in Meagher county, attached to the sixth judicial district. Subsequently that part of this county wherein the waters in controversy in that cause were situate was added to Broadwater county, a portion of the ninth judicial district. For a violation of the injunctive portion of the decree above mentioned the relators were punished for contempt by the district court of the ninth district. *Held*, on *certiorari*, that the court had jurisdiction of the contempt proceedings and could do all things to enforce the decree that its predecessor, the district court of the sixth district, might have done had the change in districts not been made.—*State ex rel. Pool et al. v. District Court et al.*, 258.

Contempt—Injunction—Parties.

9. *Quære*: May a person, who was not a party to a water right suit in which an injunction was issued, but who occupies the relation of a privy to one of the parties whose rights were adjudicated, be held to obey the mandate of the court which runs only to the parties directly interested and not to their successors and assigns, and where he may be unaware of the existence of such injunction?—*State ex rel. Pool et al. v. District Court et al.*, 258.

Injunction—Contempt—Parties.

10. Where a decree, entered in a suit to determine water rights, in terms only enjoins the parties directly interested from interfering with the rights of each other as adjusted between them, a successor in interest to the rights of one of the parties, who at one time asserted the benefits of the injunctive feature of the decree as against the other parties to it, and again willfully and knowingly disregarded the provisions of it, made himself, by such conduct, to all intents and purposes a party to it and may be held liable in contempt for a violation of it.—*State ex rel. Pool et al. v. District Court et al.*, 258.

WILLS.

See, also, Probate Proceedings, 7.

Foreign—Probate—Contests—Prohibition.

1. A will executed in another state in accordance with its laws by a testator residing there and having both real and personal property in this state at the time of his death, and subsequently duly ad-

mitted to probate there and afterward to ancillary probate in the county in this state in which the property of the testator was situated, may not be contested in the courts in this state upon the grounds that the testator at the time of making it was not of sound and disposing mind, or was acting under duress, fraud or undue influence; and prohibition lies to restrain the district court from proceeding to hear such contest.—State ex rel. Ruef v. District Court et al., 96.

Foreign—Probate.

2. While the Code of Civil Procedure does not in express terms provide for the probate of a will executed in another state, it does so impliedly by section 2351, which makes provision for a hearing of such application and notice thereof.—State ex rel. Ruef v. District Court et al., 96.

Foreign—Probate—Contest—Grounds.

3. The grounds upon which the probate of a foreign will may be contested, while not expressly designated in the Code of Civil Procedure, are impliedly set forth in section 2352 by the questions with reference to which the trial court must make findings before admitting it to probate.—State ex rel. Ruef v. District Court et al., 96.

Decree Admitting to Probate—Effect.

4. A decree of a court admitting a will to probate establishes such instrument as a will, and while the decree may be subject to attack in a proper proceeding and open to review on appeal, yet, until set aside, such decree is conclusive of all facts necessary to the validity of the will.—State ex rel. Ruef v. District Court et al., 96.

Foreign—Probate—Requisites.

5. In order to allow a will executed in another state to probate in this state, it must first appear that it was duly proved, allowed and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made, or in which the testator was at the time domiciled or in conformity to the laws of this state, and that the record is authenticated as required by section 905 of the United States Revised Statutes.—State ex rel. Ruef v. District Court et al., 96.

Public Administrators—Probate—Objections.

6. The public administrator has not any interest in the estate which entitles him to object to the probate of a will.—State ex rel. Eakins v. District Court et al., 226.

WITNESSES.

1. Absence of. See New Trial, 26.
2. Abuse of. See Attorneys, 2.
3. Competency. See Criminal Law, 19, 20.
4. Credibility. See Criminal Law, 15, 31, 40, 41, 75.
5. District judges as. See District Courts, 7.
6. Examination of. See Evidence, 39.
7. Indorsement on information. See Criminal Law, 69.
8. Limit of cross-examination. See Evidence, 40.
9. Naming of, in instructions. See Instructions, 55.
10. Parties as. See Evidence, 40.
11. Preventing them from testifying. See Ejectment, 1, 2.

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